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TRANSCRIPT OF RECORD.

163-677

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 772

THE BARBER ASPHALT PAVING COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF HARRISBURG.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals for the Third Circuit, September Term, 1894.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff in Error,
vs.
THE CITY OF HARRISBURG. } No. 16.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

1 United States Circuit Court of Appeals for the Third Circuit.

Be it remembered that on the thirtieth day of June, in the year of our Lord one thousand eight hundred and ninety-four, George Frederick Keene, Esq., of counsel for plaintiff in error, appeared in court and files a transcript of record, pursuant to a writ of error, in case of The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg, which, being read, is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Barber Asphalt Paving Company and The City of Harrisburg, a manifest error hath happened, to the great damage of the said The Barber Asphalt Paving Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the third circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States circuit court of appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the first day

of June, in the year of our Lord one thousand eight hundred and ninety-four.

SAMUEL BELL,
Clerk of the Circuit Court of the United States,
Eastern District of Pennsylvania.

Allowed by—
——— ———.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Harrisburg, Greeting:

You are hereby certified and admonished to be and appear at a United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia within thirty days, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, wherein The Barber Asphalt — Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

3 Witness the Honorable George M. Dallas, judge of the circuit court of the United States, this first day of June, in the year of our Lord one thousand eight hundred and ninety-four.

GEO. M. DALLAS, *C. J.*

June 5, 1894, service of the within writ accepted.

W. H. MIDDLETON,
City Solicitor.

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

THE BARBER ASPHALT PAVING COMPANY, a Citizen of the State of West Virginia,
vs.
THE CITY OF HARRISBURG, a Citizen of the State of Pennsylvania.
} No. 48. October Sessions, 1892.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1892, No. 48.

It is thus contained:

Be it remembered, that on the fourth day of February, in the year of our Lord one thousand eight hundred and ninety-three, the Barber Asphalt Paving Company, by its attorney, George Frederick

Keene, Esq., comes into our said court here and sues forth therefrom a writ of summons against the City of Harrisburg, which, with the endorsement and return thereon, is in the words and figures following, to wit:

UNITED STATES,
Eastern District of Pennsylvania, } *set:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you, that you summon the City of Harrisburg, a citizen of the State of Pennsylvania, late of your district, if it may be found therein, so that it be and appear before the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia, on the first Monday of February instant, to answer to the Barber Asphalt Paving Company, a citizen of the State of West Virginia, in a plea of assumpsit.

And have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States at Philadelphia, this fourth day of February, A. D. 1893, and in the one hundred and seventeenth year of the Independence of the United States.

SAMUEL BELL,
Clerk of Circuit Court, U. S.

[SEAL.]

Endorsed: No. 48. Circuit court, October session, 1892. The Barber Asphalt Company *vs.* The City of Harrisburg, summons, assumpsit. February 6, 1893, service accepted of writ and statement. Wm. H. Middleton, city solicitor. Returnable on the first Monday of February instant. Geo. Fred'k Keene, attorney for plaintiff. Filed February 6, 1893. Samuel Bell, clerk.

And afterwards, to wit, on the fourth day of February A. D. 1893, the plaintiff by its attorney Geo. Fred'k Keene, Esquire, comes into court here and files its statement, which being read is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE BARBER ASPHALT PAVING COMPANY, a Citizen of the State of West Virginia,
vs.
THE CITY OF HARRISBURG, a Citizen of the State of Pennsylvania.

This action is brought by the Barber Asphalt Paving Company to recover from the defendant, The City of Harrisburg, the sum of twenty-one thousand seven hundred twenty-nine and $\frac{99}{100}$ dollars, with interest from the 30th day of September, 1887.

The plaintiff, The Barber Asphalt Paving Company, is a body corporate, organized and existing under the laws of the State of West Virginia, and is a citizen of that State. The defendant, The City of Harrisburg, is a municipal corporation, existing under the laws of the State of Pennsylvania, and is a citizen of said last-mentioned State.

The plaintiff, The Barber Asphalt Paving Company, states its cause of action to be as follows:

On the thirteenth day of August, 1887, the plaintiff and the defendant entered into a contract in writing in regard to the improvement of a certain highway called Market street, being one of the principal thoroughfares in the city of Harrisburg in the State of Pennsylvania, of which contract the following is a copy:

"The City of Harrisburg of the one part and the Barber Asphalt Paving Company of the other part have agreed and do hereby agree as follows, viz:

"The said The Barber Asphalt Paving Company to furnish all tools, implements, material and labor, and complete to the satisfaction of the city engineer of the city of Harrisburg all such work as may be requisite to pave and curb Market street from the eastern curb-line of Front street to the Pennsylvania railroad; to begin the work under this contract upon five days' notice from the city engineer and complete the same within ninety days from the commencement of said work. The pavement to be laid as aforesaid under this contract to consist of a cement concrete base at least six inches thick, covered with a wearing surface of asphaltum at least two and a half inches thick; the curbing to be of granite; the materials to be of the very best kind obtainable, and the pavement to be laid and all the work to be done thereon in accordance with the plans and specifications prepared by the city engineer, and hereto attached, which plans and specifications are hereby made part of this contract.

"And the City of Harrisburg on its part, will pay to the said The Barber Asphalt Paving Company in accordance with the specifications and out of the assessments made and levied for the purpose, the following prices: For each and every square yard of pavement laid under this contract, the sum of two dollars and seventy-five cents ($2.75), for each and every lineal foot of granite curbing the sum of one dollar and fifty cents, ($1.50), but only upon the measurements of the city engineer, and at such intervals and in such instalments as he may determine.

"It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property-owners, and when that fund is exhausted, then the City of Harrisburg will assign to the said The Barber Asphalt Paving Company, the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and

also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract whether the said assessments are collectible or not.

"It is further understood and agreed that said company shall lay corner-stone curbing at all corners, made in accordance with the annexed specifications, and shall be entitled to receive therefor the same price as for the rest of the curbing, namely, one dollar and fifty cents ($1.50) per lineal foot.

6 "It is further understood and agreed that the said, The Barber Asphalt Paving Company, guarantees the wearing quality of the said pavement to be laid under this contract for the space of five years after the completion of the laying thereof, and hereby agrees to repair and make good any injury to said pavement within said period caused by the proper use of the same as a public highway, and to keep and maintain the same in good order and repair for the entire period aforesaid.

"It is further understood that the Barber Asphalt Paving Company hereby agrees to make all necessary repairs for property-owners and others who are compelled to open said pavement at the original contract price per square yard, namely two dollars and seventy-five cents ($2.75), whether such repairs at a given point amount to a fraction of a square yard or more; the said company further agrees to erect, keep and maintain in the city of Harrisburg, a plant embracing the necessary machinery and materials by means of which repairs can be made after the expiration of the five years' guarantee aforesaid, at prices hereinbefore mentioned; and if within any time after the expiration of the five years the said plant shall be removed or destroyed, the said Barber Asphalt Paving Company hereby agrees and covenants to give, assign and transfer to the city of Harrisburg the absolute right to use in the city their formulas and machinery for such necessary repairs, and to furnish to said city at a reasonable price, such material as must of necessity be purchased from said company to insure perfect repairs.

"It is further understood and agreed that all the work done in and about the laying of said pavement and curbing shall be considered and taken as done under this contract, and no charge, claim or demand shall be made, allowed or entertained for or on account of any extra work or material whatever.

"It is also understood and agreed that no approximate or other estimate previously made by the city engineer shall be considered in estimating the amount due to the said company under this contract, and that any and all alterations made in the specifications since the same were prepared are binding and conclusive upon both contracting parties.

"It is further understood and agreed that all disagreements and disputes that may arise between the contracting parties during the

work or after the completion of it shall be determined by the city engineer finally and conclusively for both contracting parties.

"Witness the following signatures and seals this 13th day of August, A. D. 1887.

"THE BARBER ASPHALT PAVING COMPANY.
"F. V. GREENE, *Vice-president.*

"Attest: D. O. WICKHAM, *Secretary.*"

7 Read in select council Sept. 12, 1887, approved, and it is ordered, if the common council concur, that the clerk of this council affix the seal of the city, attest the same and file this contract with the city solicitor.

A. C. McKEE,
Clerk Select Council.

Read in common council Sept. 12, 1887, and the action of select council concurred in.

JOHN SHIFFLER,
Clerk Common Council.

Thereafter said plaintiff paved and curbed said Market street, from the eastern curb-line of Front street to the Pennsylvania railroad, in accordance with the provisions of the said contract, and said work was completed by the plaintiff to the satisfaction of the city engineer of the defendant, The City of Harrisburg, and was accepted by said defendant on the tenth day of November, 1887. The plaintiff, under instructions received from time to time from the defendant, kept said pavement in good order and repair for the period of five years from the completion of the said work aforesaid. The last of said instructions were issued in writing by the authority of the defendant and were received by the plaintiff from the defendant on the twenty-eighth day of July, 1892, and on the twenty-fourth day of August, 1892, respectively, and are as follows:

HARRISBURG, PA., *July* 28, 1892.

A. S. Johnston, Esq., sup't Barber Asphalt Paving Co.

DEAR SIR: My attention has been directed by a resolution of councils to the fact that your contract or guarantee for keeping Market street in repair will expire in a few days. I therefore notify you to have Market street repaired and placed in good condition before said contract expires.

Yours, respectfully,
A. U. ZARKER,
Commissioner.

HARRISBURG, *August* 24, 1892.

A. S. Johnston, Esq., sup't Barber Asphalt Paving Co., Harrisburg, Pa.

DEAR SIR: Under the terms of the contract of the Barber Asphalt Co., with the city of Harrisburg, for the paving of Market street, from the Pennsylvania railroad to Front street, it is made one of

my duties to notify you of any repair work needed. In con-
8 versation with you it was made known that — were certain reasons why a thorough repair at this time would not be for the best interests of all parties concerned. If you are still of this opinion and will give the reasons in writing and make the same proposition in writing that you made to me, that is, an extension of one year of your time for keeping the said street in repairs, I will cheerfully submit the same to councils, with such recommendations as will seem proper to me. In order that the matter may be brought up in proper shape, I now formally notify you that the asphaltum pavement on Market street, between the points named, needs repairing generally, and more particularly at the following places: At Fifth-street crossing, north side of Market street, at west curb-line Fifth street, north side of Market street opposite No. 436, gutters at 438 and south side of Market street opposite No. 441, three places, gutter at No. 426, north side Market street opposite 424, three places, north side Market street opposite No. 420, north side Market street at Aberdeen avenue, south side No. 427, north side Market street No. 418, south side Market street Nos. 413 and 411, north side Market street opposite No. 410, south side Market street opposite 409, north side Market street opposite No. 402, three places, south side Market street opposite No. 401, north side of Market street, west side of Fourth street, south side of Market street opposite 339, north side of Market street at Dives, Pomeroy and Stewarts, south side Market street opposite Nos. 335, 333, 331, south side of Market street opposite No. 327, north side of Market street opposite No. 326, south side Market street at Dewberry avenue, south side Market street opposite Nos. 319, 317, 313, 311; gutters at 309 and 307, south side Market street at Nos. 305, 303 and 301, north side Market street at No. 308, intersections Third and Market four poles, opposite No. 320 and opposite Trust building, gutter at court-house, northeast corner Market street and Market square.

I have specified the places for your information, you will make all such other repairs as may be required.

Yours truly,

M. B. COWDEN,
Chief Engineer.

And the plaintiff has in all respects complied with the obligations imposed upon it by the said contract.

After the completion of the paving and curbing of said Market street, to wit, on or about the thirty-first day of October, 1887, the city engineer of the defendant made a measurement and estimate of said work, and, at the rate of compensation fixed by said contract, the total amount for said work according to said measurement was the sum of thirty-five thousand two hundred and $\frac{58}{100}$ dollars ($35,200.58), which sum of thirty-five thousand two hundred and $\frac{58}{100}$ dollars ($35,200.58) on the tenth day of November, 1887, it was agreed between the plaintiff and the defendant was the amount due to the plaintiff under said contract for said work.

9 At the time said contract was entered into, and afterward, until said work was completed and accepted as aforesaid,

both the plaintiff and the defendant understood and believed that the defendant had the power to make and levy an assessment for the cost of said work upon the several parcels of land abutting on and along said Market street, between Front street and Pennsylvania railroad, and to enter the same of record in the court of common pleas of Dauphin county, Pennsylvania, as municipal claims for the purpose of creating a lien upon said land, and, also, that the defendant had power to mark said claims of record to, and for the use of the plaintiff, and to permit the use by the plaintiff of the corporate name of the defendant in any legal proceeding necessary or proper to enforce the collection of such assessment; whereas, in fact, neither at the time said contract was entered into as aforesaid, nor at any time afterward, did the defendant have the power to make or levy an assessment for the cost of said work, or any part thereof, upon the said parcels of land, or any of them, or to enter any such assessment of record as aforesaid, or to mark the same of record to or for the use of the plaintiff, or to permit the use of the corporate name of the defendant in any proceeding whatever for the collection of such assessment, or to do the work aforesaid at the expense, in whole or in part, of the abutting land, or of the owners of such abutting land, as was decided by the supreme court of Pennsylvania, January 7, 1889, in the case of The City of Harrisburg, for the use of the Barber Asphalt Paving Company, against George J. Shoemaker *et al.*, and, again, January 7, 1889, in The City of Harrisburg, for the use of the Barber Asphalt Paving Company, against Mrs. C. Berghaus, which cases are reported in vol. 122 of the decisions of the said supreme court, at pages 285–289.

After said work was completed as aforesaid, and before the two decisions of the supreme court of Pennsylvania, above mentioned, were rendered, the defendant made what purported to be an assessment for the entire cost of said work upon the said abutting property, and filed in the office of the prothonotary of the court of common pleas of Dauphin county what purported to be municipal claims against the several parcels of land abutting on said Market street, between Front street and the Pennsylvania railroad, based upon such attempted assessment, and marked said claims to the use of the plaintiff; and it was in proceedings to enforce the collection of two of the claims thus made and filed, and marked to the use of the plaintiff, that the supreme court of Pennsylvania decided as aforesaid that the defendant had no power to make such assessment or to enforce such claims.

Before either of said decisions was made the owners of some of the abutting property so attempted to be assessed voluntarily paid to the defendant the several amounts assessed thereunder against their respective parcels of land, and such voluntary payments amounted in the aggregate to the sum of thirteen thousand four hundred and seventy and $\frac{59}{100}$ (13,470.59) dollars, which sum the defendant from time to time, as the same was received by it, paid over to the plaintiff on account of the amount due it for work under

said contract, leaving due and unpaid the plaintiff on account
10 of said work the sum of twenty-one thousand seven hundred and twenty-nine and $\frac{99}{100}$ (21,729.99) dollars, with interest thereon from the thirtieth day of September, 1887. The plaintiff has demanded of the defendant that the defendant shall pay to the plaintiff the said sum of twenty-one thousand seven hundred and twenty-nine and $\frac{99}{100}$ (21,729.99) dollars and interest, due the plaintiff as aforesaid, but the defendant has refused to pay to the plaintiff said sum or any part thereof, and therefore the plaintiff brings this suit, and claims the sum of twenty-one thousand seven hundred and twenty-nine and $\frac{99}{100}$ (21,729.99) dollars, with interest from the thirtieth day of September, 1887.

And whereas the plaintiff, The Barber Asphalt Paving Company on or about the thirty-first day of August, 1887, at the special instance and request of the defendant, The City of Harrisburg, furnished all tools and materials for doing the work of laying a sheet-asphalt pavement on a concrete base on the roadway of Market street in the city of Harrisburg, in the State of Pennsylvania, between Front street and the Pennsylvania railroad, and laid such pavement and placed curbstones along said roadway on both sides thereof, and said work was done in a good and workmanlike manner by the plaintiff and was accepted by the defendant on the tenth day of November, 1887, and ever since has been used and enjoyed by the defendant; and the real and true value of the work was thirty-five thousand two hundred and $\frac{58}{100}$ dollars ($35,200.58) with interest from the thirtieth day of September, 1887; yet, nevertheless, the defendant has paid to the plaintiff only the sum of thirteen thousand four hundred seventy $\frac{59}{100}$ dollars ($13,470.59) leaving due from the defendant to the plaintiff on account the sum of twenty-one thousand seven hundred twenty-nine and $\frac{99}{100}$ dollars ($21,729.99) with interest from the thirtieth day of September, 1887, which said last sum and interest the defendant though often requested has refused to pay to the damage of the plaintiff thirty thousand dollars ($30,000), and therefore the plaintiff brings this suit.

THE BARBER ASPHALT PAVING COMPANY,
By F. V. GREENE, *President.*

Witness:
JOHN P. WHITEHORN.

CITY OF NEW YORK, }
County of New York. }

Before me, John P. Whitehorn, a notary public, this twentieth day of January, 1893, personally came F. V. Greene who having first been duly qualified according to law, does say that he is the president of the Barber Asphalt Paving Company, and that the matters and allegations set forth in the foregoing statement are true and correct to the best of his knowledge and belief, and that
11 there is due the Barber Asphalt Paving Company from the city of Harrisburg for the paving of Market street the sum

of twenty-one thousand seven hundred twenty-nine $\frac{99}{100}$ dollars ($21,729.99), with interest from the thirtieth day of November, 1887.

JOHN P. WHITEHORN,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in New York county.

Endorsed: U. S. C. C., E. D. of Pa. No. 48, October sess., 1892. The Barber Asphalt Paving Co. *vs.* The City of Harrisburg. Plaintiff's statement filed February 4, 1893. Samuel Bell, clerk. Pl'ff's att'y, Geo. Fred'k Keene.

And afterwards, to wit, on the 19th day of February, A. D. 1894, comes the plaintiff by iis attorney, George Fred'k Keene, Esquire, and files its supplemental statement, which being read is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE BARBER ASPHALT PAVING COMPANY, a Citizen of the State of West Virginia,

vs.

THE CITY OF HARRISBURG, a Citizen of the State of Pennsylvania.

Plaintiff's Supplemental Statement.

On July 14, 1887, councils of the city of Harrisburg passed, and the mayor thereof duly approved joint resolution No. 195, file of select council, a copy of which is hereto attached as part hereof. On August 10, 1887, an ordinance was duly approved by the mayor of said city, having been duly passed by a two-thirds vote of both branches of councils, being ordinance No. 200, file of select council, a copy of which is hereto attached as part hereof.

The said ordinance was passed under the provisions of the act of May 24, 1887, (sec. 21 of art. 19, page 256) which is hereby made part hereof as fully as if written herein.

After due advertisement, the bid of the Barber Asphalt Paving Company to pave Market street, as set out in plaintiff's original statement, was accepted by the city and a contract was duly executed by and between the plaintiff and the defendant. A copy of said contract is contained in plaintiff's original statement.

12 That the plans and specifications attached to said contract as part thereof, contained the clause providing the method of payment for the said work as set out in section 3 of said ordinance No. 200.

The city councils then passed, and the mayor on the 23d day of Feb'y, 1888, approved ordinance No. 948, file of common council, confirming said contract and confirming the schedule of assessments which had been made under joint resolution No. 195 aforesaid, to

pay the contract price of said work. A copy of said ordinance is hereto attached as part hereof.

The work of paving said street having been duly completed, the city of Harrisburg caused such of said assessments as were unpaid to be entered as liens in the proper office of Dauphin county, and marked the same to the use of, and assigned the same of record to the Barber Asphalt Paving Company, and the said company duly accepted the same.

Upon proceedings had to enforce the collection of said liens, the supreme court of Pennsylvania decided that said act of May 24, 1887, was unconstitutional and void, being special legislation, by reason of its attempt of excessive classification of cities, and that liens entered under and by virtue of said act were unauthorized and void. Shoemaker *vs.* Harrisburg, 122 Pa., 285.

Afterwards, on May 23, 1889, the legislature of Pennsylvania passed an act authorizing re-assessments for the cost of local improvements already made (Pamphlet Laws, page 272), which act the supreme court in Chester *vs.* Black, 132 Pa., 568, declared to be valid, and in accordance therewith the councils of the city of Harrisburg passed, and the mayor duly approved ordinance No. 1160, file of common council, providing for the re-assessment of the cost of paving Market street, a copy of which is hereto attached as part hereof, and under and by virtue thereof the city caused to be made a re-assessment of the cost of said paving; and having brought suits against the several property-owners to enforce the collection thereof, the supreme court aforesaid, in Harrisburg *vs.* Segelbaum, 151 Pa., 172, decided that said property-owners abutting on Market street could not lawfully be charged with the cost of the paving thereof, because the same was not an original improvement, but a repaving thereof.

GEO. FRED'K KEENE,
Att'y for Pl'ffs.

Endorsed: 48, Oct. sess., 1892. In the circuit court of the United States, eastern district of Penna. The Barber Asphalt Company *vs.* The City of Harrisburg. Plaintiff's supplemental statement. Filed Feb. 19, 1894. Samuel Bell, clerk. Pl'ff's att'y, Geo. Fred'k Keene.

13 *File of Select Council.*

No. 195.

Read in place by Mr. Alricks May 30, 1887.

Recommended affirmatively from committee on highways June 8, 1887. Amended in select council June 22, 1887.

Joint resolution authorizing a map or plan and estimate showing the cost of paving Market street from Front street to the line of the Pennsylvania railroad, the relative location of all the property liable to assessment therefor, and authorizing a board of viewers to apportion the cost of the work, according to law.

SECTION 1. Be it resolved by the select and common councils of the city of Harrisburg, That the city engineer be and he is hereby authorized and directed to make an estimate of the total cost of paving Market street, from the eastern curb-line of Front street, of the Pennsylvania railroad, (excluding the portion occupied by part of Harrisburg City Passenger railway,) with Belgian blocks, particularly stating the items and the cost of each; also, an estimate of the total cost of paving said portion of said street, excluding the portion occupied by said railway, with asphaltum pavement, particularly stating the items and the cost of each; also, an estimate of the total cost of paving said portion of said street, with the exception of the portion occupied by said railway, with Medina stone, particularly stating the items and the cost of each; also, to include in each of said estimates the probable cost of a good curbing, not less than six inches, of dressed sound quality of stone ing into consideration such of the curbing now in place as will be found fit for resetting with such pavement as may be adopted, and also to make a map or plan of all the property liable to assessment for the cost of said improvement, and report said estimates, map or plan as early as practicable.

And be it further resolved, That Andrew K. Black, John E. Patterson, E. W. S. Parthemore, George Dunn and William Sheesley, or any three of them, who are hereby appointed viewers for the purpose, be and said board is hereby directed to view the premises included in the map or plan prepared by the city engineer, pursuant to the foregoing resolution for the paving of Market street between Front street and the Pennsylvania railroad, and make schedules separately, one for each kind of pavement for which the city engineer estimates, showing the total cash value of all the property included in said map or plan, and the amount each property-owner will be liable to pay respectively and separately for each of said proposed pavements, and report said schedules to councils as early as practicable.

14 *File of Select Council.*

No. 200.

Read in place by Mr. Alricks July 11, 1887.

Reported from highway committee affirmatively (as amended) July 12, 1887.

An ordinance directing the paving and curbing of Market street from the eastern curb-line of Front street to the Pennsylvania railroad and providing for the collection of the expense thereof.

SECTION 1. Be it ordained by the select and common councils of the city of Harrisburg, That Market street, from the eastern curb-line of Front street to the Pennsylvania railroad, be paved and curbed; the curbing to be of first-class granite not less than five inches at the top in thickness. The top and one and one-fourth inches on each side dressed, (six cut), the balance hammer-pointed, not less than six inches from the top. The paving to be according to an approved contract: Provided, that so much of said street as is now or which may be before the contract herein provided for is let, be occupied by any street passenger railway company, shall be excluded, and such portions paved by or at the expense of such passenger railway company.

SECTION 2. That the committee on highways be and it is hereby authorized to advertise for sealed proposals, and award a contract for the paving of said street, and require the contractor to enter into and acknowledge a bond, with at least two sufficient sureties, in the sum of ten thousand dollars, conditioned for the faithful performance of all the terms and conditions of the contract, and such bond shall be approved by the city solicitor. The advertisement for bids as herein required shall be published in two newspapers of this city, for at least ten days, and the contract when awarded shall be submitted to councils for approval.

SECTION 3. It shall be the duty of the city engineer to draw up and simultaneously with the advertisement required by the foregoing section, to exhibit in his office, full specifications of the plans for and the manner of constructing said pavement, of all the material to be used therefor, and when said work shall be commenced and all other necessary information. He shall give notice in said specification that the contractor shall collect the cost of paving said street, from moneys to be collected by the city treasurer from the property-owners whose land fronts or abuts on said street between the points hereinabove mentioned, and that the city of Harrisburg shall under no circumstances be held responsible for the payment of any part of the cost of said improvement, except as to amounts actually received from such owners by the city treasurer for the contractor.

15 SECTION 4. The city engineer shall superintend the work under the contract, and see that the same is properly per-

formed, and shall make estimates from time to time, when not less than one block is completed to his satisfaction, under the contract, when a warrant shall be drawn for such amount, if any, as shall have been paid into the city treasury upon the assessments upon the property within such block, and when the work is finally completed the final estimate shall be given upon the approval of the work by the committee on highways, and the assessments remaining unpaid shall be entered as liens and assigned to the contractor or marked to his use.

SECTION 5. The assessments for the paving and curbing of said street shall be and are hereby made and levied upon the real estate upon both sides thereof, and shall be payable in five equal installments, the first of which shall be due and payable at the expiration of thirty days after the commencement of the work; the second installment shall be due and payable at the expiration of one year after the commencement of the work; the third installment shall be due and payable at the expiration of two years from the commencement of the work; the fourth installment shall be due and payable at the expiration of three years from the commencement of the work, and the fifth and last installment shall be due and payable at the expiration of four years from the commencement of the work. The second, third, fourth, and fifth installments shall bear interest at the rate of six per centum per annum, commencing thirty days after the commencement of the work, until paid: Provided, that if either the first or any subsequent installment shall remain unpaid for the space of two months after the same shall become due the whole of the assessment remaining unpaid shall be due and payable: And provided further, that any person upon whose property any assessment shall have been made, may pay all or as many of such installments as he may desire before the same are due. Notice of the amount and the time when each installment of the assessment for the improvement authorized by this ordinance, falls due, shall be mailed by the city treasurer to each of the persons by whom the same is payable, at least ten days before the day of payment, and a copy of such notice shall also be left upon the premises, which shall be equivalent to personal service upon all persons concerned.

SECTION 6. At the expiration of thirty days from the commencement of the work, the city treasurer shall certify to the city solicitor the names of all delinquents, if known, together with a full description of all properties liable to assessment or against which assessments have been made and levied, and the city solicitor shall proceed to collect the same according to law, with interest from the date of the notice from the city treasurer, additions and costs; and the total amount of said assessments, or so much thereof as may be necessary, is hereby appropriated to the payment of the contract price for the work and all other expenses.

16 *File of Common Council.*

No. 948.

Read in place by Mr. Houtz Nov. 14, 1887.

Reported from highway committee affirmatively.

An ordinance ratifying, approving, and confirming the contract between the city of Harrisburg and the Barber Asphalt Paving Company for the paving and curbing of Market street from the eastern curb-line of Front street to the Pennsylvania railroad, and approving, ratifying, and confirming the schedule of assessments for the payment thereof, made and reported by the board of viewers appointed by and under the joint resolution approved the 14th of July, A. D. 1887, No. 195, file of select council.

SECT. 1. Be it ordained by the select and common councils of the city of Harrisburg, That the contract for the paving and curbing of Market street, between the eastern curb-line of Front street and the Pennsylvania railroad, with sheet asphalt, &c., awarded to the Barber Asphalt Paving Company, and the written articles of agreement entered into between the said company and the city of Harrisburg, pursuant to said award, be and the same are hereby approved, ratified and confirmed.

That the schedule of assessments for the payment of the expense of said paving and curbing, made and reported by the board of viewers appointed by and under the joint resolution, approved the 14th day of July, A. D. 1887, No. 195, file of select council, hereto annexed, be and said assessments are hereby approved, ratified and confirmed; and the several amounts mentioned in said schedule as the *pro rata* share of the owners of property along said street between the points above named, respectively, are hereby levied upon the several properties mentioned in said schedule and the map or plan attached thereto.

To the select and common councils of the city of Harrisburg:

The undersigned, constituting the board of viewers and assessors of the said city, respectfully report: That having been duly sworn or affirmed according to law, and having given five days' notice of the time of view to all property-owners interested, by postal card, addressed to their respective residences, and by publication in the Daily Telegraph and Morning Call, two newspapers of said city, as required by ordinance No. 514 of the file of common council, the said viewers and assessors did, on the fifth day of August, A. D. 1887, at 1.30 o'clock in the afternoon of said day, meet at the corner of Front and Market streets in said city, and thence proceeded to view the property included in the map or plan, hereto an-
17 nexed, of the property liable to assessment for the cost and expenses of the proposed paving of Market street from Front

street to the line of the Pennsylvania railroad with asphaltum pavement, and of curbing same, and have assessed the estimated cost and expenses of said proposed paving, to wit, the sum of $31,737.50, and the cost and expenses of said curbing, to wit, $6,398.25, as set forth on the said annexed map or plan, upon the owners of the real estate bounding and abutting upon said Market street from Front street to the Pennsylvania railroad, by an equal assessment on the feet front bounding or abutting as aforesaid, and they respectfully submit the following schedule, showing the names of the several property-owners, the total cash value of the property assessed, as nearly as can be ascertained, and the amount each property-owner will be liable to pay for the said proposed improvement.

Feet front.	Names of property-owners.	Location of property.	Amount each property-owner will be liable to pay for curbing.	Cash value of property assessed.	Amount each property-owner will be liable to pay for paving.
77.7	Hummel, Mrs. Richard	N. side Market street	$163 05	$6,000 00	$695 03
26.7	Fager, George C.	do.	40 05	6,000 00	238 84
35.6	Maeyer, David	do.	53 40	5,600 00	318 45
27.7	Hummel, George W.	do.	41 55	6,000 00	247 78
	Wiestling, George B.	do.			
	Wiestling, Edwin B.	do.			
	Wiestling, Miss Annie	do.			
	Wiestling, Miss Ella	do.			
18.3	Hamersley, Mrs. Emma	do.	27 45	5,000 00	163 70
24.	Gilbert's, Henry, heirs	do.	63 60	7,000 00	214 68
37.2	Greenawalt, Jacob	do.	83 40	13,000 00	332 76
	Greenawalt, Jeremiah K.	do.			
	Shoemaker, George J.	do.			
	Whiteman, Mrs. M.	do.			
120.3	Scheffer, Mrs. Rose	do.	230 55	12,000 00	09
	Shoemaker, George E.	do.			
	Evans, Annie R	do.			
	Shoemaker, L. C.	do.			
60.	City of Harrisburg	do.		10,000 00	36 70
28.	Shunk, Gertrude W.	do.	91 95	13,000 00	250 46
	Wyeth, Mary	do.			
	Wyeth, Louis	do.			
	Wyeth, J. W.	do.			
50.	Shearer, Joseph	do.	75 00	7,500 00	447 25
	Denehey, William P.	do.			
33.	Cohen, Harris	do.	49 50	7,000 00	295 19
46.5	Wyeth, Frank	do.	97 35	15,000 00	415 95
105.	Dauphin county	do.	185 10	30,000 00	939 23
53.5	Commonwealth G. T. and S. D. Co.	do.	80 25	55,000 00	478 56
51.5	Bergner, Mrs. George	do.	122 85	30,000 00	460 67
	Bergner, Charles H.	do.			
	Bergner, Frederick U.	do.			
	Bergner, Louisa	do.			
	Bergner, Kate	do.			
28.5	Farmers' bank	do.	84 75	14,000 00	254 93
23.7	Brady, Mrs. William	do.	35 55	8,000 00	212 00
	Brady, Miss Emma	do.			
	Breitinger, Miss Louisa	do.			
28.6	Breitinger, Charles A.	do.	42 90	9,000 00	255 83
	Breitinger, Emma M.	do.			
25.	Kerper, John F.	do.	37 50	14,000 00	223 63
25 5	Cunkle, Mrs. George	do.	38 25	14,000 00	228 10
24.2	Dougherty's, Mrs. Philip, heirs	do.	36 30		216 47
29.	Cameron, Simon	do.	43 50	16,000 00	259 41
	Calder, Miss Mary	do.			
	McKee, Mrs. Barbara	do.			
	McKee, Catharine	do.			
25.5	McKee, Annie	do.	65 85	10,000 00	228 10
	McKee, G. W.	do.			
	McKee, John	do.			
	McKee, Thomas	do.			

Feet front.	Names of property-owners.	Location of property.	Amount each property-owner will be liable to pay for curbing.	Cash value of property assessed.	Amount each property-owner will be liable to pay for paving.
18					
27.3	Patriot Publishing Company	N. side Market street	$68 55	$17,000 00	$244 20
25.2	McKee, Mrs. Barbara	do	37 80	10,000 00	225 42
	McKee, Catharine	do			
	McKee, Annie	do			
	McKee, G. W	do			
	McKee, John	do			
	McKee, Thomas	do			
28 3	Murray, William	do	42 45	12,000 00	253 15
24.3	Hummel, Samuel	do	36 45	11,000 00	217 37
26.2	Shellenberger, Mrs. Henry	do	39 30	14,000 00	234 36
26.2	Wallower, Elias Z	do	39 30	12,000 00	234 36
22.8	Wallower, Elias Z	do	34 20	10,000 00	203 95
29.7	Rehrer, Miss C. M	do	83 70	15,000 00	265 67
25.	Alleman, Mrs. A. E	do	75 90	14,000 00	223 63
26.	Alstead, Mrs. M. A	do			
26.	Klugh, George A	do	39 00	8,000 00	232 57
24.7	Holman, Samuel	do	37 05	9,000 00	220 94
29.	Gilbert, Lyman D	do	43 50	10,000 00	259 41
27.5	Snyder, Mrs. William H	do	41 25	9,000 00	245 99
25.2	Kreider, Daniel	do	37 80	9,000 00	225 42
52.6	Jennings', William, estate	do	106 50	17,000 00	470 51
23.4	Stricker, Mary	do	62 70	9,000 00	209 32
	Morton, John	do			
	Morton, C	do			
	Morton, Mrs. M	do			
23.8	Rauch, Mrs. E	do	35 70	9,000 00	212 90
23.	McAfee, Adam	do	34 50	10,000 00	205 74
35.1	Forney & Bro	do	52 65	15,000 00	313 97
26.7	Tausig, Jacob	do	40 05	6,000 00	238 84
25.2	Raysor, John	do	37 80	9,000 00	225 42
26.7	Reese, Cyrus J	do	40 05	8,000 00	238 84
26.1	Leedy's, Daniel, estate	do	76 65	10,000 00	233 47
79.	Eby, Mrs. Elizabeth G	do	156 00	28,000 00	705 66
	Eby, Fannie M	do			
25.4	Hummel, George W	do	38 10	8,000 00	227 21
72.	Beatty, Mrs. Catharine	do	139 50	30,000 00	644 04
81.6	Pennsylvania Railroad Company	S. side Market street	153 90	15,000 00	729 92
20.	Frisch, Mrs. Wilhelmina	do	67 50	10,000 00	178 90
	Frisch, Bernhart	do			
	Frisch, Miss W	do			
52.4	Eby, Mrs. Elizabeth G.	½ do	94 35	20,000 00	468 72
	Eby, Fannie M				
	Eby, Maurice C				
	Eby, William H				
35.3	Kunkel, Benjamin S	½ do	52 95	8,000 00	315 76
	Barnitz, Jerome T	do			
	Barnitz, George C	do			
23.6	Marks, Herman	do	35 40	8,000 00	211 12
19.7	Barnitz, Jerome T	do	29 55	7,000 00	176 23
26.2	Cohen, Harris	do	39 30	7,500 00	234 37
27.6	Detweiler, Mrs. Henry	do	41 40	9,000 00	246 90
25.2	Russ, Patrick	do	37 80	8,000 00	225 43
78 6	Pennsylvania Railroad Co	do	117 90	20,000 00	703 09
26.7	Strause, Joseph	do	67 65	7,500 00	238 85
74.7	Simon, John B	do	139 65	25,000 00	668 22
30.	Strause, Benjamin	do	83 40	8,000 00	268 36
30.	Wagner, Mrs. Jane	do	84 15	12,000 00	268 36
22.6	Sayford, William	do	33 90	8,000 00	202 17
52.	Motter, John	do	78 00	20,000 00	465 15
26.3	Stober, Henry	do	39 45	15,000 00	235 27
26.5	Hershey, Henry	do	39 75	15,000 00	237 05
25.6	Strouse & Brother	do	38 40	15,000 00	229 01
27.	Oenslager, John	do	68 10	12,000 00	241 53
26.2	McKee, Mrs. Barbara	do	66 90	7,000 00	234 37
	McKee, Catharine	do			
	McKee, Annie	do			
	McKee, G. W	do			
	McKee, John	do			
	McKee, Thomas	do			
13.2	Haehnlen estate	do	19 80	4,000 00	118 09
13.4	Strouse, Joseph	do	20 10	5,000 00	119 87
26.5	Strouse & Brother	do	39 75	10,000 00	237 06
26.2	Detweiler, Samuel	do	39 30	12,000 00	234 37

Feet front.	Names of property-owners.	Location of property.	Amount each property-owner will be liable to pay for curbing.	Cash value of property assessed.	Amount each property-owner will be liable to pay for paving.
19					
29.8	Hessenberger, Charles	S. side Market street	$44 70	$13,000 00	$266 58
22.	Zollinger, William G	do.	33 00	10,000 00	196 80
16.7	Strouse, Joseph	do.	25 05	5,000 00	149 10
18.	King, Mrs. Harriet S	do.	27 00	9,000 00	161 01
18.	Mechanics' bank	do.	69 00	10,000 00	161 02
52.5	Hunter, Mrs. George W	do.	124 35	35,000 00	469 62
28.5	Bergner, Mrs. George	do.	42 75	14,000 00	254 94
	Bergner, Charles H	do.			
	Bergner, Frederick U	do.			
	Bergner, Miss Louisa	do.			
	Bergner, Miss Kate	do.			
25.	McCormick's, James, estate	do.	37 50	15,000 00	223 63
25.5	Dock, Mrs. Clara	do.	38 25	15,000 00	228 10
26.	Gilbert's, Henry, heirs	do.	39 00	15,000 00	232
26.	Dock, Gilbard	do.	39 00	16,000 00	232
26.5	Segelbaum, Charles S	do.	67 35	16,000 00	23 57
27.5	McCormick's, James, estate	do.	68 85	7,000 00	2 06
130.	Fleming, David	do.	244 95	35,600 00	5 99
	Fleming, Mrs J	do.			
	Fleming, William R	do.			
	Bruner, Mrs. Helen	do.			,162 85
60.	City of Harrisburg	do.		10,000 00	
69.1	Haldeman, Mrs. Jacob	do.	153 75	12,000 00	536 70
21.4	Berghaus, Mrs V	do.	32 10	6,000 00	191 43
67.	Gross, Daniel W	do.	128 10	20,000 00	618 10
25 6	Ingram, Samuel D	do.	66 00	7,500 00	599 32
49.4	Bailey, Charles L	do.	74 10	10,000 00	441 89
135.	Ray, Mrs. Susan B	do.	249 00	15,000 00	1,207 58
3,548			$6,398 25	$1,123 ,600 00	$31,737 50

Respectfully submitted,

A. K. BL ACK,
WM. SH EESLEY,
JOHN E. PATTERSON,
Viewers and Appraisers.

August 8, 1887.

20 File folio 114.

File of Common Council.

No. 116 0.

Read in place by request by Mr. Miller Sept. 29, 1889.

Finance committee discharged Nov. 25, 1889.

Highway committee of select council, affirmatively, Jan. 10, 1890.

An ordinance to provide for the re-assessment of the cost of paving and curbing Market street from the Pennsylvania railroad to Front street.

Whereas, the councils of the city of Harrisburg, by ordinance duly passed and approved by the mayor, did direct that Market street, from the Pennsylvania railroad to Front street, should be paved and curbed, the cost thereof to be paid by the properties according to their foot frontage;

And whereas, the said Market street, between the points named, has been paved with sheet asphalt and curbed, but the cost thereof has not been paid by all the properties according to their foot frontage, therefore,

SECTION 1. Be it ordained by the select and common councils of the city of Harrisburg, and it is hereby ordained by the authority of the same: That the cost of paving and curbing Market street, from the Pennsylvania railroad to Front street, be re-assessed upon the properties according to their foot frontage on said part of Market street, and that Andrew K. Black, Wilson Elder, and George W. Sourbeer be, and they are hereby, appointed viewers to make said re-assessment for the cost of paving and curbing said street between the points named, upon the respective properties in proportion to the number of feet, the same front on Market street, between the points named, according to the provisions of an act of the General Assembly, approved the 23d day of May, 1889: Provided, however, that where any property has paid the whole or any part of said property's share of the total cost of said paving and curbing, then such property shall be given credit for the amount of such payment on the re-assessment hereby ordered to be made.

SECTION 2. The said viewers are hereby directed to give not less than five days' notice of the time and place of making said re-assessment to the owners of all the property or properties likely to be affected thereby, said notice shall be given, and it shall be deemed sufficient if so given, by publication in two newspapers published in the city of Harrisburg for at least five days, and by serving notice upon an adult person residing upon each of the said properties: Provided, however, in case an adult person cannot be found residing upon any of the said properties, then said notice shall be posted or tacked upon such property or properties.

21

SECTION 3. That upon the completion of the re-assessment, made as hereinbefore directed, the said viewers shall immediately report the same to the councils.

And afterwards, to wit, on the 19th day of February, A. D. 1894, the defendant by its attorney, Wm. H. Middleton, Esq., comes into court here and files its demurrer to the plaintiff's statement, which being read is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE BARBER ASPHALT PAVING COMPANY, a Citizen of the State of West Virginia,

vs.

THE CITY OF HARRISBURG, a Citizen of the State of Pennsylvania.

And the said defendant by its solicitor, Wm. H. Middleton, says that the statement and supplemental statement are not sufficient in law.

WM. H. MIDDLETON,
City Solicitor.

Endorsed: 48, Oct. sess., 1892. In the circuit court United States eastern district of Pennsylvania. The Barber Asphalt Paving Company *vs.* The City of Harrisburg. Demurrer filed Feb. 19, 1894. Samuel Bell, clerk. Wm. H. Middleton, city solicitor.

And afterwards, to wit, on the 24th day of April, A. D. 1894, come the parties aforesaid by their counsel aforesaid, and this cause being called for argument on demurrer, and having been argued by counsel for the respective parties, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 1st day of May, A. D. 1894, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, file the following opinion, to wit:

22 Circuit Court of the United States, Eastern District of Pennsylvania.

THE BARBER ASPHALT PAVING COMPANY *vs.* THE CITY OF HARRISBURG. } Oct. Sess., 1892. No. 48.

(Defendant's demurrer to plaintiff's statement of claim.)

DALLAS, *Cir. J.:*

By a contract in writing between the plaintiff and the defendant, the former agreed to do certain paving, and, having fully complied with and performed the contract on its part, brings this suit to compel the defendant to pay for the work. The defendant demurs to the statement of claim, and, in support of its demurrer, relies upon the following clauses of the contract:

"And the city of Harrisburg on its part, will pay to the said, The Barber Asphalt Paving Company, in accordance with the specifications, and out of the assessments made and levied for the purpose, the following prices: * * * * It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property-owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said, The Barber Asphalt Company, the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract whether the said assessments are collectible or not."

When the contract was made, and until after the work thereunder had been completed, both parties supposed that the defendant could lawfully make and enforce the assessments referred to in the foregoing extracts. In reliance upon this supposition, assessments were made, and municipal claims based thereon were filed, marked to the use of the plaintiff, and by it accepted. The owners of some of the abutting properties paid without suit, and the sum of these payments ($13,470.59) the defendant paid over to the plaintiff. Every obligation of the defendant was precisely fulfilled in accordance with the terms of the contract. It became, and was, an executed contract.

This is unquestionable; but the plaintiff, nevertheless, insists
23 that the defendant is still liable to it for the amount ($21,729.99) of the claims which have not been voluntarily paid, because those claims, by reason of the absence of lawful power in the defendant, to levy the assessments, are invalid, and, therefore, worthless. The lack of power alleged is established by decisions of the supreme court of Pennsylvania in three cases, in which it has pronounced the statute (act of the General Assembly of the State of Pennsylvania, of May 24, 1887), upon which alone the existence of such power depended, to be unconstitutional: Shoemaker *et al.*, *vs.* Harrisburg; Berghaus *vs.* Same; Klaugh *vs.* Same, 122 Pa. St., 285, 289 and 291. These cases were commenced—in the name of this defendant to the use of this plaintiff—by writs of *scire facias* on asserted municipal claims, which had been marked to the use of the plaintiff, as has been mentioned; and judgments therein conclusively determine that all such claims are absolutely void, and the plaintiff's expectation of collecting the balance of its compensation against the abutting properties, is, therefore, disappointed. But does it follow from this that it is entitled to recover from the defendant? If it is—as it is not alleged that the defendant has committed any wrong—it must be because it has, by contract, either express or implied, assumed the liability now sought to be fixed upon it. The pertinent part of the only express contract has been fully quoted. It is impossible to find in it any undertaking by the defendant to pay otherwise than by special assessments, and this undertaking is coupled with that of the plaintiff to "accept the said assessments in payment." But the contention of the plaintiff's counsel, as I understand it—though not so expressed, amounts to this: That, as incident to the express contract, there was an implied warranty by the defendant that it had lawful power to levy the assessments, and that, a breach of that warranty having been shown, a right of action accrued. The theory upon which this position is founded might be accepted, even as against a municipality, without conceding its applicability to this case; for it is never admissible to imply a contract at variance with that which the parties have expressed, and, in the present instance, the expressed intent precludes an implication of the warranty alleged. Since the year 1874 (P. L., p. 230) the defendant had had authority to apply its general revenues to paving its streets. On May 24th, 1887, the act was approved (Penna. statute, *supra*) by which it was intended to confer upon it the power to charge the cost upon the abutting properties.

The defendant's supposed right to do this was derived solely from the last-mentioned act, and this was known to the plaintiff as well as to the defendant when, on August 13th, 1887, within three months after the passage of the empowering act, and admittedly with reference to it, the contract in suit was entered into. The plaintiff desired to do the work, and the defendant, of course, desired to have it done, but was not willing to impose the expense upon its treasury. Hence, with the manifest object of excluding the possibility of inference that the defendant might be required to make payment from its general resources, it was provided that it should pay by special assessments, and that "the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

The agreement was not merely that the defendant would pay
24 in the manner stated, but also that it should not be liable to pay in any other manner. To me this seems the reasonable and natural construction of the language used, and, if this understanding is correct, it results that the warranty contended for cannot be implied, and that the plaintiff's case must fall for want of any contract to support it.

A number of decisions of the courts of several of the States have been cited; but it is impossible to reconcile them, for they are not harmonious, and it would be profitless to discuss them, for none of them is of binding authority, or has determined my judgment. Suffice it to say, the subject has been twice considered by the supreme court of Pennsylvania (in which State this contract was made), and the decision of that tribunal, in each of the cases referred to, accords with the conclusion which I have now reached. In Horter *vs.* Philadelphia (13 W. N. C., 40), that court said:

"In this case the plaintiffs expressly agreed in the event of a failure to collect the assessment bills that no recourse should be had against the city. The plaintiffs knew the restricted power of the city, and had the same knowledge it had of the legal invalidity of the particular assessment in question. The city did all which she agreed to do. With this full knowledge and means of knowledge, the plaintiffs voluntarily assumed the risk of collecting the assessment. Having failed in the attempt so to do, they cannot now repudiate their agreement and make the city liable to them."

The opinion of the same court in Dickinson *vs.* The City of Philadelphia (14 W. N. C., 367), is as follows:

"The contract on which this suit was brought expressly stipulates that 'all costs of paving, excepting intersections and for curb and gutter stones, shall be collected by the contractor from the owners of the property fronting on the said Market street,' and also that the city 'shall be at no expense for said paving, excepting crossing stone and intersections of streets and the necessary gutter stone for the intersections.' The exemption of the city from all liability to pay for the paving is thus stated in clear and unmistakable language. The city shall incur no expense, and the contractor shall look to the owners of the property fronting on the street for his work and materials. If he has failed so to collect his claim, in the

language of Horter *vs.* The City (*supra*), he cannot now repudiate his agreement, and make the city liable to pay him.'

Careful reading of the reports of these cases, and especially of the points which were made in argument, discloses that neither of them is distinguishable from this one in principle, and that in them substantially the same questions which are now raised were presented. It is true that in the Horter case the power of the city was, by statute, restricted to the mode of payment agreed upon, but the judgment of the court was rested upon the terms of the contract itself, and although in the present case the city of Harrisburg might have contracted to pay otherwise than by assessments, the fact is that it carefully avoided doing so. It is also true that in Horter *vs.*
25 City, the defect of power was only as to a single property-owner, but as to that one the defect was as complete and absolute as in this instance, and the court seems to have attached no weight to the contention, which was there made, that the city was liable because it "could, in point of law, deliver no assessment bills," &c. In Dickonson *vs.* Philadelphia (*supra*), the contract had been made by the commissioner of highways, in pursuance of an act of the legislature. The court, however, did not regard that circumstance as material, but, deeming the controlling facts to be the same, decided the case as they had decided the Horter case, and upon the same grounds.

The cases to which I have particularly referred, and the views which I have endeavored to present, are not in conflict with the judgment of the Supreme Court of the United States in Hitchcock *vs.* Galveston, 96 U. S., 341. There the promise was to pay in bonds of the promisee which it had no authority to issue, and the court held that this defect of power could not be set up to wholly avoid payment. But in Horter *vs.* Philadelphia, in Dickinson *vs.* Philadelphia, and in the case now before this court, the promise was not to pay in obligations of the defendant but in claims against others, the collection of which was to be at the risk of the plaintiff without recourse to the defendant. In Hitchcock *vs.* Galveston, the debt was the defendant's, and the only question was as to the manner of payment. In this case the plainly expressed agreement is that the contractor shall look to the abutting properties, and to them only. By its terms he is bound, and no consideration of the supposed hardship to result from maintaining them, would justify any attempt on the part of this court to defeat their legal effect. As was said by the Supreme Court in Peake *vs.* New Orleans (139 U. S., 361): "We trust that this court will never falter in its duty of brushing away all false pretences, and holding every municipality obedient to the spirit as well as the letter of all its contract obligations. At the same time it is equally the duty of this court, as of all others, to see to it that no burden is cast upon tax-payers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality; and when a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither

justice nor equity will tolerate that it be charged as debtor therefor."

The demurrer is sustained and judgment for the defendant.

Endorsed: No. 48. Oct. sess., 1892, C. C. U. S., E. D. of Pa. Barber Asphalt Company *vs.* City of Harrisburg. Opinion of the court (Dallas, J.), sustaining demurrer, and ordering judgment for defendant. Filed May 1, 1894. Samuel Bell, clerk.

Eo die. Judgment entered for the defendant, and against the plaintiff.

26 Circuit Court of the United States, Eastern District of Pennsylvania.

THE BARBER ASPHALT PAVING COMPANY *vs.* THE CITY OF HARRISBURG. } Oct. Sessions, 18 No. 48.

Assignment of Error.

1. The learned court erred in sustaining the demurrer and in entering judgment for the defendant.
2. The learned court erred in not overruling the demurrer and in not entering judgment for the plaintiff.

GEO. FRED'K KEENE,
CHAS. H. BERGNER,
A. S. WORTHINGTON,
By GEO. FRED'K KEENE,
Att'y- for Barber Asphalt Paving Co., Plaintiffs.

Endorsed: No. 48. Oct. sessions, 1892. C. C. U. S., E. D. of Pa. The Barber Asphalt Paving Co. *vs.* The City of Harrisburg. Assignment of error. Filed May 11, 1894. Samuel Bell, clerk. Pl'ff's att'ys, Geo. Fred'k Keene, Chas. H. Bergner, A. S. Worthington.

Know all men by these presents, that we, The Barber Asphalt Paving Company, as principal, and the Equitable Trust Company of Philadelphia, as sureties, are held and firmly bound unto the city of Harrisburg, in the full and just sum of five hundred dollars, to be paid to the said city of Harrisburg, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally, by these presents. Sealed with our seals and dated this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately, at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between the Barber Asphalt Paving Company, a citizen of the State of West Virginia, and the City of Harrisburg, a citizen of the State of Pennsylvania, a judgment was rendered against the said The Barber Asphalt Paving Company, and

the said The Barber Asphalt Paving Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a
27 citation directed to the said The City of Harrisburg, citing and admonishing it to be and appear at a United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such, that if the said The Barber Asphalt Paving Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BARBER ASPHALT PAVING CO.
E. BURGESS WARREN,
Vice-president. [SEAL.]

Attest: J. C. ROCK, *Secretary.*

THE EQUITABLE TRUST COMPANY.
[SEAL.] WM. F. HARRITY, *President.*

Attest: F. J. JOHANN, *Secretary.*

Sealed and delivered in presence of—
——.

Approved by—
GEO. M. DALLAS, *C. J.*

Endorsed: 48. Oct. sessions, 1892. Circuit court of the U. S., E. D. of Penna. Barber Asphalt Co. *vs.* The City of Harrisburg. Bond filed June 1, 1894. Samuel Bell, clerk. Pl'ff's att'ys, Geo. Fred'k Keene, Chas. H. Bergner, A. S. Worthington.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the *following* to be a true and faithful copy of the original pleas and proceedings in the case of The Barber Asphalt Paving Company *vs.* The City of Harrisburg, No. 48, October sessions, 1892, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

SAMUEL BELL,
Clerk of C. C.

28 (Endorsed:) Transcript of record. United States circuit court of appeals for the third circuit. September term, 1894. No. 16. The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg. In error to the circuit court of the United States for the eastern district of Pennsylvania. Filed June 30, 1894.

29 Afterwards, to wit, on the twenty-eighth day of September, A. D. 1894, this cause being called for argument before Hon. M. W. Acheson, circuit judge, and Hon. William Butler and Hon. Leonard E. Wales, district judges, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the thirteenth day of November, A. D. 1894, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion, viz:

30 United States Circuit Court of Appeals, Third Circuit.

BARBER ASPHALT PAVING COMPANY, Plaintiff in Error
vs.
CITY OF HARRISBURG.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Butler, and Wales, JJ.

BUTLER, *J.*:

The plaintiff, a citizen of West Virginia, and the defendant, of Pennsylvania, entered into a contract on Aug. 13, 1887, which contained the following provisions:

"The said Barber Asphalt Paving Company to furnish all tools, implements, materials, and labor, and complete to the satisfaction of the city engineer of the city of Harrisburg all such work as may be requisite to pave and curb Market street from the eastern curb-line of Front street to the Pennsylvania railroad; to begin the work under this contract upon five days' notice from the city engineer, and complete the same within ninety days from the commencement of said work; the pavement to be laid as aforesaid under this contract to consist of a cement concrete base at least six inches thick, covered with a wearing surface of asphaltum at least two and a half inches thick; the curbing to be of granite; the materials to be of the very best kind obtainable, and the pavement to be laid and all the work to be done thereon in accordance with the plans and specifications prepared by the city engineer and hereto attached; which plans and specifications are hereby made part of this contract.

31 "And the City of Harrisburg on its part will pay to the said The Barber Asphalt Paving Company, in accordance with the specifications and out of the assessments made and levied for the

purpose, the following prices: For each and every square yard of pavement laid under this contract, the sum of two dollars and seventy-five cents ($2.75); for each and every lineal foot of granite curbing, the sum of one dollar and fifty cents ($1.50), but only upon the measurements of the city engineer and at such intervals and in such instalments as he may determine.

"It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property-owners; and when that fund is exhausted, then the City of Harrisburg will assign to the said The Barber Asphalt Paving Company the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due under this contract, and the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

The plaintiff performed its part of the contract and received on account $13,470.59, paid from assessments, leaving $21,729.92 of the contract price unsatisfied.

32 At the date of the contract the defendant had authority to pave its streets and pay for the same from its treasury. It believed it had authority also to assess the cost of such paving on abutting properties and transfer the obligations thus created in payment for the work. The plaintiff had no reason to doubt the correctness of this belief. The legislature, by an act of May 24, 1887, had provided for such assessments. The supreme court of the State, however, after the work had been completed, declared the act invalid. Harrisburg *vs.* Shoemaker and Harrisburg *vs.* Berghaus and in Ayers' appeal, 122 Pa. St., 285, 289, 266. After entering into the contract the defendant went through the form of making assessments, and the property-holders paid $13,470.59 before the invalidity of the statute was discovered. They refused, however, to pay more, and, the defendants denying liability for the balance due under the contract, this suit was commenced to recover it.

On demurrer filed to the plaintiff's statement the circuit court rendered judgment for the defendant; whereupon the plaintiff appealed and assigned this action of the court as error.

Is the defendant liable? The suit is on the contract, and the liability must be found in it, if at all.

As we have seen, the defendant had power to contract for paving its streets at the cost of its treasury. It did not, however, so contract in terms. Is it liable to pay from this source in consequence of the terms used and the facts stated? It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that "the city shall not be otherwise liable,

33 whether the assessments be collectible or not." Omitting

the language just quoted, there could be no doubt of the defendant's liability. The case would be identical in all respects with Hitchcock *vs.* Galveston, 96 U. S., 341. The language quoted does not, however, we think, add anything to the force or effect of that which precee*d*s it. It simply expresses what would be implied in its absence. The agreement to accept the assessments in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant in such case had made and transferred the contemplated assessments, it would have discharged its entire obligation, just as it would in the present case. This, however, it has not done. Its attempt to do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority, as it would be if it resulted from any other cause beyond its control. It undertook, unconditionally, to make and transfer assessments, and its failure is a breach of the contract. To say its obligation is discharged by [illegible] vain attempt to make them, that the plaintiff is bound to accept a useless forms of assessments, is unreasonable. The parties contemplated valid charges on the property. The term assessment clearly implies this; nothing short of a lawful assessment, one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept and assumed the risk of collecting. The [illegible] were mutually mistaken respecting the authority to [illegible] special manner designated, but this does not relieve the [illegible] from its obligation to pay.

If anything is wanting to render this construction [illegible] defendants

34 it may be found in the fact that the language [illegible] uction clearer, taken word for word from the statute, and [illegible] age involved is signify here what it does there. There the term [illegible] must necessarily fies and can only signify a proceeding which [illegible] n assessment signithe property specified. The statute first provides creates a charge on ing and charge and then for its transfer to [illegible] vides for this proceedthis charge which is to be transferred and [illegible] o the contractor. It is to assume the risk of collecting. There [illegible] which the contractor is ing such collections. Prior liens or other causes always some risk attendproperty insufficient to pay, and this [illegible] her causes may render the and the contract made under it contemplates only is the risk the statute contemplated.

The defendant, having failed to make the required assessments, is in default upon its contract and must make reparation by paying the consequent loss. There is no hardship in it, and if there was it would afford no justification or excuse for shifting it to the plaintiff. The defendant has received full value for what *he* is required to pay; and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not consistent with the intention of the parties, but avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it.

There is abundant authority for this construction. Hitchcock *vs.* Galveston, 96 U. S., 341, is in point. The city contracted with Hitchcock to do certain work upon the streets, for which he was to accept its bonds in payment. It had, however, no authority to

issue the bonds, and, discovering this while the work was in progress, stopped it and declined to pay for what was done on the ground that its contractor had bound himself to depend upon this
35 source of payment alone. The court, deciding that the contract contemplated and required valid bonds, and that as the city had failed to furnish such, held the contract broken and the city liable to pay from its treasury. In principal this case is not distinguishable from the one before us. The court says: "It is enough that the city council had power to enter into the contract for the improvement; that such a contract was made; that the plaintiff has proceeded to furnish materials and do the work, as well as assume liabilities; that the city has received and now enjoys the benefit of what he has done and furnished; that for these things the city promises to pay, and that after having received the benefit of the contract the city has broken its promise. It matters not that the promise was to pay in a manner not authorized by law. If the payment cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

White *vs.* Snell, 5 Pickering, 425; Hussey *vs.* Sibley, 66 Me., 192; Miller *vs.* Milwaukee, 14 Wis., 765; Bill *vs.* City of Denver, 29 Fed. Rep., 304, involved the same question and were similary decided. In Chicago *vs.* The People, 56 Ill., 327; Maher *vs.* Chicago, 38 Ill., 272; Louisville *vs.* Hyatt, 5 B. Mon., 200; Fisher *vs.* St. Louis, 44 Miss., 482, and Schofield *vs.* Council Bluffs, 68 Iowa, 695, the contractor distinctly agreed to look to assessments alone for payment, and yet the municipalities, having no authority to make them, were held liable to pay otherwise.

The numerous authorities cited by the defendant are not inconsistent with this construction. Peak *vs.* New Orleans, 139 U. S., 342, is based upon an essentially different state of facts. The city
36 was not a party to the contract sued on and in nowise responsible for it. The work was done under a scheme devised by the state legislature and under a contract with officers designated by it for the drainage of swamp lands (a part only of which was within the city limits) for the benefit, primarily, of its owners. A careful examination of this case will show that it rests exclusively on these facts, though the last paragraph of the syllabus read alone would justify a different conclusion.

Horter *vs.* Philadelphia, 13 W. N. C., 40, and Dickson *vs.* Phila., 14 W. N. C., 367, as we understand them, rest on the same principle. In the first the improvement was made under the State statute of 1855, which provides that the cost of such work shall be borne by adjoining property-holders. There was no authority, as it seems, to put it on the city. While the opinion of the court and report of the case are very brief, the decision appears to rest on this ground. If it were otherwise, the case would be in direct conflict with Chicago *vs.* The People, 56 Ill., 327. In Dickson *vs.* Phila., 14 W. N. C., 367, the city appears to have no connection whatever with the work. The statute under which it was done designated an officer to do it, empowering him to made contracts and collect money to pay the

cost. That he held the office of city commissioner of highways is immaterial; he was the agent of the State in discharging his duties under the statute. Here again the opinion of the court is very brief and the report of the case so meagre that it was necessary to examine the records to understand what was decided, which we found to be no more than just stated.

The numerous other cases cited are equally inapplicable. In Belleview *vs.* Hohn, 82 Ky., 1, the municipality was without
37 authority to pay except by assessments on adjoining properties. Saxton *vs.* St. Josephs, 60 Mo., 153, rests on the city's want of power to contract as she did. Casey *vs.* Leavenworth, 17 Kansas, 198, was decided on the fact that the city had kept its contract by collecting and applying the assessments named with reasonable vigilance. Newman *vs.* Sylvester, 42 Indiana, 146, was a suit against individuals and is inapplicable to the facts involved here. Other cases cited may be distinguished as easily.

The judgment is therefor- reversed and the case remanded to the circuit court for further proceedings.

Filed November 13, 1894.

38 And afterwards, to wit, on the twenty-second day of November, A. D. 1894, the court enters the following order, viz:

United States Circuit Court of Appeals, Third Circuit, September Term, 1894.

BARBER ASPHALT PAVING COMPANY, Plaintiff in Error,
vs.
THE CITY OF HARRISBURG. } No. 16.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs.

And it is further ordered that the case be remanded to the said circuit court for further proceedings.

GEO. M. DALLAS, *Cir. J.*

Philadelphia, November 22nd, 1894.

39 United States Circuit Court of Appeals for the Third Circuit.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff in Error,
vs.
THE CITY OF HARRISBURG. } No. 16. Sept. Term, 1894.

Motion and Reasons for a Rehearing.

To the honorable the judges of the United States circuit court of appeals for the third circuit:

The City of Harrisburg, defendant in the above-stated cause, respectfully moves the court for a rehearing therein, for the following reasons:

1. The opinion of the learned court seems to be based on the assumption that the city agreed to make and deliver assessments, and that having failed to make and deliver assessments that were valid and legal, it was in default on its contract.

We submit that nothing in the pleadings warrants this assumption. Nowhere on the face of this record can be found any such covenant.

40 The record shows that the assessments had been made before the contract was entered into, and all the city agreed to do was to assign those assessments already made. The paving company to take all the risk as to their validity, and in no event to hold the city liable.

An inspection of pages 30 and 31 of the Record will show the passage of joint resolution of councils, introduced May 30, 1887, authorizing a board of viewers to make an assessment of the cost of the work, which assessment was duly made and reported to councils on August 8, 1887, as will be seen on page 41 of the Record. And on August 10, 1887, the ordinance No. 200, file of select council, was duly approved by the mayor (page 25 of the Record), wherein it is ordained (page 33 of the Record) "the assessments for the paving and curbing of said street shall be and are hereby made and levied upon the real estate upon both sides thereof." While the contract between the parties was signed by the paving company on August 13, 1887, and agreed to by the councils on behalf of the city on September 12, 1887 (page 13 of the Record).

That the parties intended this particular assessment, (made before the contract), admits of no question, because the city did assign and the paving company did accept it, and because the reference thereto in the contract is in the perfect tense. "Will pay * * * out of the assessments made and levied." "Will assign * * * the municipal claims assessed and levied," is the language used (pages 9 and 10 of the Record), and is the only language used on that subject in the whole contract.

It will thus be seen that the paving company agreed to accept assessments already made, with full knowledge of their legal invalidity, and agreed to have no recourse against the city in the

event of their failure to collect them. Such was its contract, and neither law nor equity should have power to change it.

It is therefore respectfully urged that the learned court
41 erred in holding that the city agreed to make and deliver valid assessments.

2. The learned court erred in not giving force to the clause of the ordinance (page 32 of the Record) which provides "And that the city of Harrisburg shall under no circumstances be held responsible for the payment of any part of the cost of said improvement."

Because the contract was based on the ordinance, and the ordinance was as much a part of the contract as if written therein.

3. The learned court erred in holding that "the plaintiff had no reason to doubt the correctness of this belief," meaning the belief as to the power of the city to assess the cost of the work.

The plaintiff had every reason to doubt this belief. The law did not authorize it and plaintiff was bound to know the law. *Ignorantia legis neminem excusat.*

4. The learned court erred in holding that "after entering in the contract the defendant went through the form of making assess- to ments."

As we have shown in our first reason, this is incorrect.

5. The learned court erred in holding that "it undertook unconditionally to make and transfer assessments."

As we have shown in our first reason, it only undertook to deliver such assessments as had already been made, the plaintiff to assume the risk of their validity.

6. The learned court erred in holding that "the parties contemplated valid charges on the property. * * * It was such assessments the plaintiff agreed to accept, and assume the risk of collecting."

42 We respectfully submit that nothing in the whole record warrants this finding, for the reasons hereinbefore stated, and for the additional reason that if the parties had so intended they would have so contracted. All the rest of their intentions are set forth in clear and explicit language in the contract, and if such had been their intention it would have been so set forth also.

7. The learned court erred in holding that, "there is always some risk attending such collections. Prior liens, or other causes, may render the property insufficient to pay."

Because such assessments, if valid, are in the nature of taxes and have priority to any other lien or incumbrance, and are not discharged by any judicial sale, except as to such portion of the proceeds of said sale as may actually be applied to the payment of such liens.

Therefore there is practically no risk in their collection, if valid, and the contracting parties cannot be held to have contemplated a risk that did not exist. They could only have intended, and did actually intend, the risk of the validity of the assessments.

8. The learned court erred in holding that its construction of the contract was "consistent with the intentions of the parties."

The city intended that in no event should it be liable for the

work or any part of it; and the paving company was willing to contract on those terms, and did so contract, as we believe the record shows.

9. The learned court erred in referring to "the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it."

There is no injustice in law or morals in holding parties to
43 their contractual obligations; nor is there any injustice in defendant holding plaintiff's property without paying for it, if plaintiff has so agreed.

It would be, however, we submit, a grave injustice to the taxpayers of the city to make them pay to the plaintiff something that plaintiff agreed they should not pay. It is placing a burden on the municipality which it never intended to assume, and making it pay for work which it would never have consented to have had done at its own cost, and work which would never have been done but for plaintiff's agreement to look to third parties for payment.

10. The learned court erred in holding that Hitchcock *vs.* Galveston, 96 U. S., 341, is in point.

The vital distinction between that case and this lies in the fact that in that case the debt was the defendant's, and the only question was as to the manner of the payment; while in this case the promise was not to pay in obligations of the defendant, but in claims against others, the collection of which was to be at the risk of the plaintiff without recourse to the defendant.

11. The learned court erred in its construction of the cases of Horter *vs.* Philadelphia, 13 W. N. C., 40, and Dickinson *vs.* Philadelphia, 14 W. N. C., 367.

We submit that the following extracts from the opinion of Judge Dallas show the true reason and spirit of the opinion in these cases:

"Careful reading of the reports of these cases, and especially of the points which were made in argument, discloses that neither of them is distinguishable from this one in principle, and that in them substantially the same questions which are now raised were presented. It is true that in the Horter case the power of the city was by statute restricted to the mode of payment agreed upon, but the judgment of the court was rested upon the terms of the con-
44 tract itself, and although in the present case the city of Harrisburg might have contracted to pay otherwise than by assessments, the fact is that it carefully avoided doing so. It is also true that in Horter *vs.* City, the defect of power was only as to a single property-owner, but as to that one the defect was as complete and absolute as in this instance, and the court seems to have attached no weight to the contention, which was there made, that the city was liable because it 'could in point of law deliver no assessment bills,' &c. In Dickinson *vs.* Philadelphia, the contract had been made by the commissioner of highways, in pursuance of an act of the legislature. The court, however, did not regard that circumstance as material, but, deeming the controlling facts to be the

same, decided the case as they had decided the Horter case and upon the same grounds."

12. The learned court erred in reversing, and not affirming the judgment of the lower court.

For these reasons, and many more which might be adduced, we respectfully but earnestly urge that a rehearing be allowed us.

The case is of great importance to the municipality, not only on account of the amount involved, but because of the existence of other contracts of the same nature, not only in the city of Harrisburg, but in other cities in Pennsylvania; and feeling as we do, that the learned court has misunderstood the facts of the case, we should be allowed to be again heard thereon in justice as well to the court as to the parties; so that a decision of such vital importance, may be made only after the fullest hearing and investigation.

Respectfully submitted.

WM. H. MIDDLETON,
City Solicitor.

45 (Endorsed:) United States circuit court of appeals for ... third circuit. No. 16. September term, 1894. The Ba... the Asphalt Paving Company, plaintiff in error, *vs.* The City of H... rber burg. Motion and reasons for a rehearing. Wm. H. Mid... arris- city solicitor. Filed December 12th, 1894. ...dleton,

46 And afterwards, to wit, on the twenty-first day ... of Decem- ber, A. D. 1894, the court enters the following o... der, viz:

United States Circuit Court of Appeals, Third Ci... cuit, September Term, 1894.

THE BARBER ASPHALT PAVING COMPANY, Plainti... ff in Error,
vs.
THE CITY OF HARRISBURG. } No. 16.

In error to the circuit court of the United States for the eastern district of Pennsyl... vania.

By the court, December 21, 1894: Rehearing refused.

47 And afterwards, to wit, on the fifth day February, A. D. 1895, the court enters the following order, viz:

United States Circuit Court of Appeals, Third Circuit, September Term, 1894.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff in Error,
vs.
THE CITY OF HARRISBURG. } No. 16.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

And now, to wit, this fifth day of February, A. D. 1895, it is ordered that mandate issue to the said circuit court of the United

States for the eastern district of Pennsylvania in accordance with the opinion and judgment of this court in said cause.

GEO. M. DALLAS, *Cir. J.*

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Whereas lately, in the circuit court of the United States for the eastern district of Pennsylvania, before you or some of you, in a cause between The Barber Asphalt Paving Company, a citizen of the State of West Virginia, plaintiff, against The City of Harrisburg, a citizen of the State of Pennsylvania, defendant, wherein the demurrer and judgment of the said circuit court entered in said cause on the nineteenth day of February, 1894, are in the following words, viz.:

"And the said defendant, by its solicitor, Wm. H. Middleton, says that the statement and supplemental statement are not sufficient in law."

And afterwards, on the first day of May, 1894, "judgment
49 entered for the defendant and against the plaintiff," as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the third circuit by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

50 And whereas, in the present term of September, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said plaintiff, The Barber Asphalt Paving Company, recover against the said defendant, The City of Harrisburg, eighty-five dollars and seventy-five cents for its costs herein expended and have execution therefor.

And it is further ordered that the cause be remanded to the said circuit court for further proceedings.

Philadelphia, November 22, 1894.

51 You therefore are hereby commanded that such execution and further proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the fifth day

of February, in the year of our Lord one thousand eight hundred and ninety-five.

WM. V. WILLIAMSON,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Costs of Plaintiff in Error.

Clerk	$19 75
Printing record	46 00
Attorney	20 00
	$85 75

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 16. Sept. term, 1894. Barber Asphalt Paving Co., plaintiff in error, *vs.* City of Harrisburg. Mandate. Filed February 5, 1895.

52 United States Circuit Court of Appeals, Third Circuit, September Term, 1894.

Costs of Barber Asphalt Paving Company in No. 16.

1894, Sept. term.—Docketing cause and filing record, $5.00; [illegible] ances .75; filing precipe and receipt, 1.00; filing papers, appearing briefs, $5.00; argument, .20; judgment, $1.00; fili[illegible], .75; fil- .25; recording, .40; mandate, $5.00; preparing record [illegible]ng same, etc., $12.00; cost of printing record, $34.00; attorney [illegible] for printer, $20.00; costs and copy, .40.....[illegible]'s docket fee, [illegible]..... 85 75

Fee Book 1, page 215. 85 75

Test:

WM. V. WILLIAMSON,
Clerk Circuit Court of [illegible] Appeals, 3d Circuit.

53 UNITED STATES OF AMERICA, *sct.*:

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages, from one to fifty-three, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg, No. 16, September term, 1894, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. V. WILLIAMSON,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. 16. Sept. term, 1894. United States circuit court of appeals, third circuit. The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg. Certified copy of transcript of record.

Endorsed on cover: Case No. —. United States cir. ct. of appeals, third circuit. Term No., —. The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg. Filed ——, 189–.

Office Supreme Court U. S.
FILED.
OCT 14 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. —.772

THE BARBER ASPHALT PAVING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY OF HARRISBURG.

Petition of the City of Harrisburg for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM H. MIDDLETON,
City Solicitor.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. —.

THE CITY OF HARRISBURG, PETITIONER.

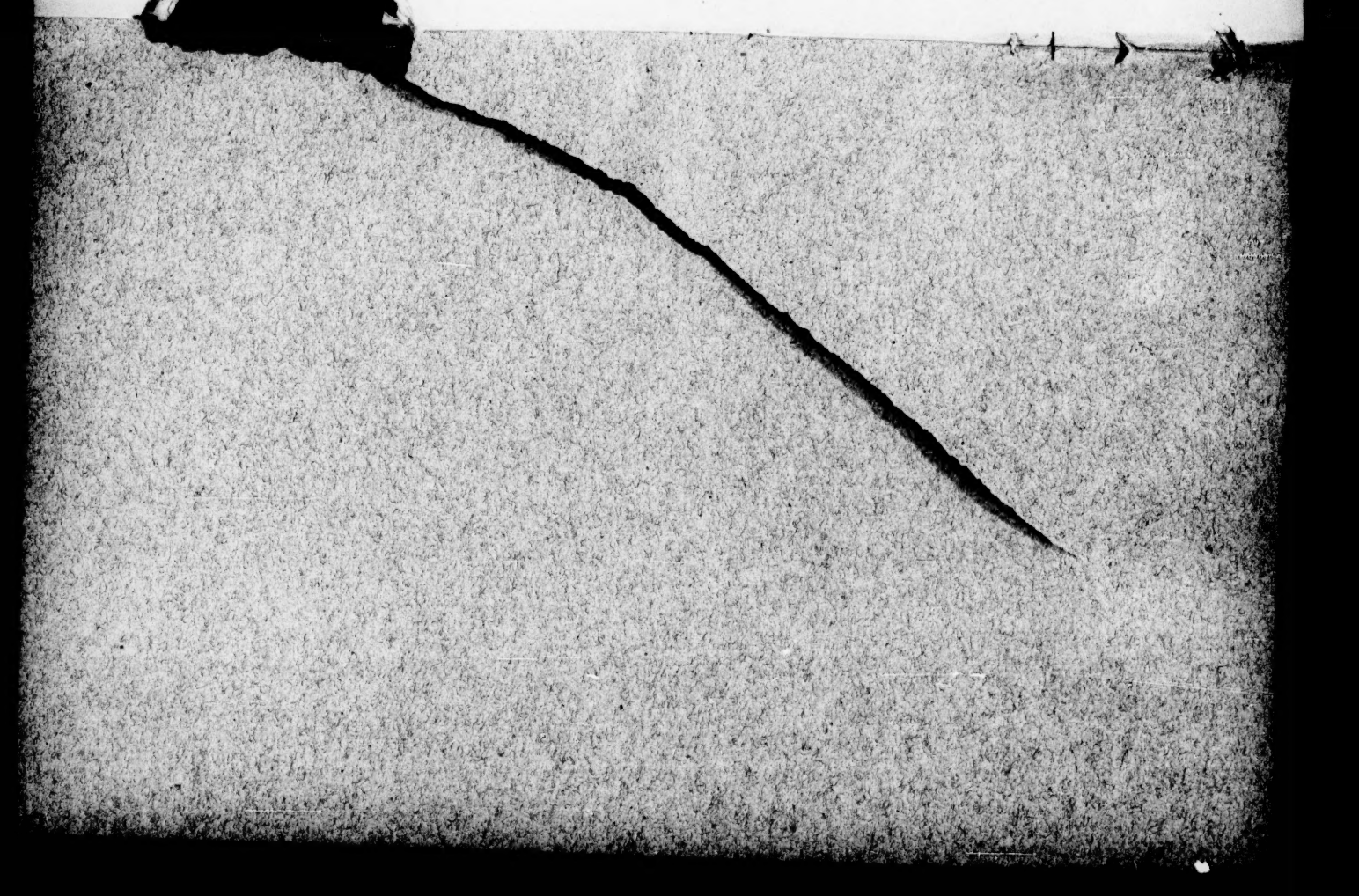
PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF THE CITY OF HARRISBURG, PLAINTIFF IN ERROR, *VERSUS* THE BARBER ASPHALT PAVING COMPANY, DEFENDANT IN ERROR.

To the Honorable the Supreme Court of the United States:

The petition of The City of Harrisburg respectfully shows to this honorable Court as follows:

I. That in an action at law brought in the United States circuit court for the eastern district of Pennsylvania The Barber Asphalt Paving Company, plaintiff below, sought to recover from the city of Harrisburg the sum of $21,729.99 and interest thereon from November 30, 1887, claiming that the said city was liable to them for that amount on the following facts:

II. On May 24, 1887, the legislature of Pennsylvania duly passed an act for the government of the cities of the State,



IN THE

Supreme Court of the United States.

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II. On May 24, 1887, the legislature of Pennsylvania duly passed an act for the government of the cities of the State,

which, *inter alia*, authorized the paving of streets and the assessment of the cost thereof on the abutting properties, and by virtue of such authority the councils of Harrisburg enacted and on August 10, 1887, its mayor approved an ordinance directing the paving and curbing of Market street, in said city. Said ordinance contained the following stipulation:

"That the contractor shall collect the cost of paving said street from moneys to be collected by the city treasurer from the property-owners whose land fronts or abuts on said street between the points hereinabove mentioned, and that the city of Harrisburg shall under no circumstances be held responsible for the payment of any part of the cost of said improvement, except as to amounts actually received from such owners by the city treasurer for the contractor."

III. That plans and specifications for said work were d[illegible]uly prepared and furnished to bidders (including the B[illegible]arber Asphalt Paving Company), which specifications set forth that the city would not be responsible for any pa[illegible]t of the cost of said work, as provided in said ordinanc[illegible]e, and the contract for said work was duly awarded to the Barber Asphalt Paving Company.

IV. That thereupon, on the 13th day of August, 1887, a written contract was entered into betw[illegible]een the parties (to which contract said plans and specifi[illegible]cations were attached as part thereof), wherein it was pro[illegible]vided:

"And the city of Harrisburg on its part will pay to the said The Barber Asphalt Paving Company, in accordance with the specifications and out of the assessments made and levied for the purpose, the following prices: * * * It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property-owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said The Barber Asphalt Paving Company the municipal claims assessed

and levied upon the properties abutting on and along the said Market street between the points above mentioned or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

V. Prior to the making of said contract and the passage of said ordinance an assessment of the cost of the work had been made by a board of viewers (appointed under a joint resolution of councils) and reported to councils and duly approved on August 8, 1887.

VI. That, the work being completed, the city of Harrisburg paid to the Barber Asphalt Paving Company $13,470.59, being the full amount of assessments paid into its treasury by the property-owners, and caused such of said assessments as were unpaid, to the full amount of the balance due said Barber Asphalt Paving Company, to be entered as liens in the proper office of Dauphin county, and marked the same to the use of and assigned the same of record to the Barber Asphalt Paving Company, and the said company duly accepted the same.

VII. Upon proceedings had to enforce the collection of said liens, the supreme court of Pennsylvania decided that said act of May 24, 1887, was unconstitutional and void, being special legislation by reason of its attempt at excessive classification of cities, and that liens entered under and by virtue of said act were unauthorized and void. (Shoemaker *vs.* Harrisburg, 122 Penna., 285.)

VIII. Afterwards, on May 23, 1889, the legislature of Pennsylvania passed an act authorizing re-assessments for the cost of local improvements already made (Pamphlet Laws of 1889, page 272), and in accordance therewith and under and by virtue thereof the city caused to be made a re-assessment of the cost of said paving, and having brought suits against the several property-owners to enforce the collection thereof, the supreme court aforesaid, in Harrisburg *vs.* Segelbaum, 151 Pa., 172, decided that said property-owners abutting on Market street could not lawfully be charged with the cost of the paving thereof, because the same was not an original improvement.

IX. That The Barber Asphalt Paving Company, the plaintiff below, filed its statement and supplemental statement of its cause of action in the United States circuit court for the eastern district of Pennsylvania, containing the facts as hereinbefore set forth, and The City of Harrisburg thereupon filed its demurrer thereto.

X. On the 24th day of April, A. D. 1894, the said cause came on to be heard in the United States circuit court for the eastern district of Pennsylvania, before the Honorable George M. Dallas, circuit judge of the United States for the eastern district of Pennsylvania, and was argued by counsel, and the said court on May 1, 1894, filed its opinion in writing, finding in favor of the defendant, The City of Harrisburg, and ordering judgment for the defendant on the demurrer; which judgment of said court is as follows:

CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA, OCTOBER SESSION, 1892.

THE BARBER ASPHALT PAVING COMPANY
vs.
THE CITY OF HARRISBURG. } (46), (48.)

(*Defendant's Demurrer to Plaintiff's Statement of Claim.*)

DALLAS, *Cir. J.:*

By a contract in writing between the plaintiff and the defendant the former agreed to do certain paving, and, having fully complied with and performed the contract on its part, it brings this suit to compel the defendant to pay for the work. The defendant demurs to the statement of claim, and in support of its demurrer relies upon the following clauses of the contract:

"And the city of Harrisburg on its part will pay to the said The Barber Asphalt Paving Company, in accordance with the specifications and out of the assessments made and levied for the purpose, the following prices: ———. It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of assessments paid into the city treasury by the property-owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said The Barber Asphalt Company the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

When the contract was made and until after the work thereunder had been completed both parties supposed that the defendant could lawfully make and enforce the assessments referred to in the foregoing extracts. In reliance upon this supposition, assessments were made and municipal claims based thereon were filed, marked to the use of the plaintiff, and by it accepted. The owners of some of the abutting properties paid without suit, and the sum of these payments ($13,470.59) the defendant paid over to the plaintiff. Every obligation of the defendant was precisely fulfilled in accordance with the terms of the contract. It became and was an executed contract. This is unquestionable, but the plaintiff nevertheless insists that the defendant is still liable to it for the amount ($21,729.99) of the claims which have not been voluntarily paid, because those claims by reason of the absence of lawful power in the defendant to levy the assessments are invalid, and therefore worthless. The lack of power alleged is established by decisions of the supreme court of Pennsylvania in three cases, in which it has pronounced the statute (act of the General Assembly of the State of Pennsylvania of May 24, 1887), upon which alone the existence of such power depended, to be unconstitutional: Shoemaker *et al. vs.* Harrisburg, Berghaus *vs.* Same, Klaugh *vs.* Same, 122 Pa. St., 285, 289, and 291. These cases were commenced, in the name of this defendant to the use of this plaintiff, by writs of *scire facias* on asserted municipal claims which had been marked to the use of the plaintiff, as has been mentioned, and judgments therein conclusively determine that all such claims are absolutely void, and the plaintiff's expectation of collecting the balance of its compensation against the abutting properties is therefore disappointed; but does it follow from this that it is entitled to recover from the defendant? If it is, as it is not alleged that the defendant has committed any wrong, it must be because it has by contract, either expressed or implied, assumed the liability now sought

to be fixed upon it. The pertinent part of the only express contract has been fully quoted. It is impossible to find in it any undertaking by the defendant to pay otherwise than by special assessments, and this undertaking is coupled with that of the plaintiff to accept the said assessments in payment; but the contention of the plaintiff's counsel, as I understand it, though not so expressed, amounts to this: That, as incident to the express contract, there was an implied warranty by the defendant that it had lawful power to levy the assessments, and that a breach of that warranty having been shown a right of action accrued. The theory upon which this position is founded might be accepted, even as against a municipality, without conceding its applicability to this case, for it is never admissible to imply a contract at variance with that which the parties have expressed, and, in the present instance, the expressed intent precludes an implication of the warranty alleged. Since the year 1874 (P. L., p. 230) the defendant had had authority to apply its general revenues to paving its streets. On May 24, 1887, the act was approved (Penna. Statute, *supra*), by which it was intended to confer upon it the power to charge the cost upon the abutting properties. The defendant's supposed right to do this was derived solely from the last-mentioned act, and this was known to the plaintiff as well as to the defendant when, on August 13, 1887, within three months after the passage of the empowering act and admittedly with reference to it, the contract in suit was entered into. The plaintiff desired to do the work and the defendant, of course, desired to have it done, but it was not willing to impose the expense upon its treasury. Hence, with the manifest object of excluding the possibility of inference that the defendant might be required to make payment from its general resources, it was provided that it should pay by special assessments, and that "the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not." The agreement was not

merely that the defendant would pay in the manner stated, but also that it should not be liable to pay in any other manner. To me this seems the reasonable and natural construction of the language used, and, if this understanding is correct, it results that the warranty contended for cannot be implied, and that the plaintiff's case must fall for want of any contract to support it.

A number of decisions of the courts of several of the States have been cited, but it is impossible to reconcile them, for they are not harmonious and it would be profitless to discuss them, for none of them is of binding authority or has determined my judgment. Suffice it to say the subject has been twice considered by the supreme court of Pennsylvania (in which State this contract was made), and the decision of that tribunal in each of the cases referred to accords with the conclusion which I have now reached. In Horter *vs.* Philadelphia, 13 W. N. C., 40, that court said:

"In this case the plaintiffs expressly agreed in the event of a failure to collect the assessment bills that no recourse should be had against the city. The plaintiffs knew the restricted power of the city and had the same knowledge it had of the legal invalidity of the particular assessment in question. The city did all which she agreed to do. With this full knowledge and means of knowledge the plaintiffs voluntarily assumed the risk of collecting the assessment. Having failed in the attempt so to do, they cannot now repudiate their agreement and make the city liable to them."

The opinion of the same court, Dickinson *vs.* The City of Philadelphia, 14 W. N. C., 367, is as follows:

"The contract on which this suit was brought expressly stipulates that all costs of paving, excepting intersections and for curb and gutter stones, shall be collected by the contractor from the owners of the property fronting on the said Market street, and also that the city shall be at no expense for said paving excepting crossing stone and intersections of streets and the necessary gutter stone for the intersections. The exemption of the city from all liability to

pay for the paving is thus stated in clear and unmistakable language: The city shall incur no expense, and the contractor shall look to the owners of the property fronting on the street for his work and materials. If he has failed so to collect his claim, in the language of Horter *vs.* The City (*supra*), he cannot now repudiate his agreement and make the city liable to pay him."

Careful reading of the reports of these cases, and especially of the points which were made in argument, discloses that neither of them is distinguishable from this one in principal, and that in them substantially the same questions which are now raised were presented. It is true that in the Horter case the power of the city was, by statute, restricted to the mode of payment agreed upon, but the judgment of the court was rested upon the terms of the contract itself, and although in the present case the city of Harrisburg might have contracted to pay otherwise than by assessments the fact is that it carefully avoided doing so. It is also true that in Horter *vs.* City the defect of power was only as to a single property-owner, but as to that one the defect was as complete and absolute as in this instance, and the court seems to have attached no weight to the contention, which was there made, that the city was liable because it could, in point of law, deliver no assessment bills, etc. In Dickinson *vs.* Philadelphia (*supra*) the contract had been made by the commissioner of highways in pursuance of an act of the legislature. The court, however, did not regard that circumstance as material, but, deeming the controlling facts to be the same, decided the case as they had decided the Horter case and upon the same grounds.

The cases to which I have particularly referred and the views which I have endeavored to present are not in conflict with the judgment of the Supreme Court of the United States in Hitchcock *vs.* Galveston, 96 U. S., 341. There the promise was to pay in bonds of the promisee, which it had no authority to issue, and the Court held that this defect of

power could not be set up to wholly avoid payment; but in Horter *vs.* Philadelphia, in Dickinson *vs.* Philadelphia, and in the case now before this Court the promise was not to pay in obligations of the defendant, but in claims against others, the collection of which was to be at the risk of the plaintiff without recourse to the defendant. In Hitchcock *vs.* Galveston the debt was the defendant's, and the only question was as to the manner of payment. In this case the plainly expressed agreement is that the contractor shall look to the abutting properties and to them only. By its terms he is bound, and no consideration of the supposed hardship to result from maintaining them would justify any attempt on the part of this Court to defeat their legal effect. As was said by the Supreme Court in Peake *vs.* New Orleans, 139 U. S., 361:

"We trust that this Court will never falter in its duty of brushing away all false pretenses and holding every municipality obedient to the spirit as well as the letter of all its contract obligations. At the same time it is equally the duty of this Court as of all others to see to it that no burden is cast upon tax-payers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality, and when a contract for local improvements is entered into the contractor must look to the special assessments and to them alone for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor."

The demurrer is sustained, and judgment for the defendant.

Endorsed: No. 48. Oct. sess., 1892, C. C. U. S., E. D. of Pa. Barber Asphalt Company *vs.* City of Harrisburg. Opinion of the court (Dallas, J.) sustaining demurrer and ordering judgment for defendant. Filed May 1, 1894. Samuel Bell, clerk.

Eo die, judgment entered for the defendant and against the plaintiff.

XI. A writ of error to said court for the review of said judgment was duly allowed by the circuit court of appeals for the third circuit on the — day of May, 1894, and error was assigned, as appears in Transcript, page 26.

XII. The cause came on to be heard in the said circuit court of appeals on the 28th day of September, 1894, before the Honorable Marcus W. Acheson, circuit judge of the said United States court for the third circuit; Honorable William Butler, district judge for the eastern district of Pennsylvania, and the Honorable Leonard E. Wales, district judge for the district of Delaware, and on the 13th day of November, A. D. 1894, the said court rendered a judgment reversing the said judgment of the said United States circuit court for the eastern district of Pennsylvania and filed the opinion of the court as follows:

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

BARBER ASPHALT PAVING COMPANY, *Plaintiff in Error*,
vs.
CITY OF HARRISBURG.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Butler, and Wales, JJ.

The plaintiff, a citizen of West Virginia, and the defendant, of Pennsylvania, entered into a contract on August 13, 1887, which contained the following provisions:

"The Barber Asphalt Paving Company to furnish all tools, implements, materials, and labor and complete to the satisfaction of the city engineer of the city of Harrisburg all such work as may be requisite to pave and curb Market street from the eastern curb line of Front street to the Pennsylvania railroad; to begin the work under this contract upon five days' notice from the city engineer and complete

the same within ninety days from the commencement of said work; the pavement to be laid as aforesaid under this contract to consist of a cement concrete base of at least six inches thick, covered with a wearing surface of asphaltum at least two and a half inches thick; the materials to be of the very best kind obtainable and the pavement to be laid and all the work to be done thereon in accordance with the plans and specifications prepared by the city engineer and hereto attached, which plans and specifications are hereby made part of this contract.

"And the city of Harrisburg on its part will pay to the said Barber Asphalt Paving Company, in accordance with the specifications and out of the assessments made and levied for the purposes, the following prices: For each and every square yard of pavement laid under this contract, the sum of two dollars and seventy-five cents ($2.75); for each and every lineal foot of granite curbing, the sum of one dollar and fifty cents ($1.50); but only upon the measurements of the city engineer and at such intervals and in such instalments as he may determine.

"It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property-owners, and when that fund is exhausted then the city of Harrisburg will assign to the said The Barber Asphalt Paving Company the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

The plaintiff performed its part of the contract and received on account $13,470.59, paid from assessments, leaving $21,729.92 of the contract price unsatisfied.

At the date of the contract the defendant had authority

to pave its streets and pay for the same from its treasury. It believed it had authority also to assess the cost of such paving on abutting properties and transfer the obligations thus created in payment for the work. The plaintiff had no reason to doubt the correctness of this belief. The legislature by an act of May 24, 1887, had provided for such assessments. The supreme court of the State, however, after the work had been completed, declared the act invalid (Harrisburg *vs.* Shoemaker and Harrisburg *vs.* Berghaus, and in Ayers' appeal 122 Pa. St., 285, 289, 266). After entering into the contract the defendant went through the form of making assessments and the property-holders paid $13,470.59 before the invalidity of the statute was discovered. They refused, however, to pay more, and, the defendant denying liability for the balance due under the contract, this suit was commenced to recover it.

On demurrer filed to the plaintiff's statement the circuit court rendered judgment for the defendant; whereupon the plaintiff appealed and assigned this action of the court as error.

Is the defendant liable? The suit is on the contract and the liability must be found in it, if at all.

As we have seen, the defendant had power to contract for paving its streets at the cost of its treasury. It did not, however, so contract in terms. Is it liable to pay from this source in consequence of the terms used and the facts stated? It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that "the city shall not be otherwise liable whether the assessments be collectible or not." Omitting the language just quoted, there could be no doubt of the defendant's liability. The case would be identical in all respects with Hitchcock *vs.* Galveston, 96 U. S., 341. The language quoted does not, however, we think, add anything to the force or effect of that which precedes it. It simply expresses what would be implied in its absence. The agreement to accept

the assessment in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant in such case had made and transferred the contemplated assessments, it would have discharged its entire obligation, just as it would in the present case. This, however, it has not done. Its attempt to do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority, as it would be if it resulted from any other cause beyond its control. It undertook unconditionally to make and transfer assessments, and its failure is a breach of the contract. To say its obligation is discharged by a vain attempt to make them, that the plaintiff is bound to accept useless forms of assessments, is unreasonable. The parties contemplated valid charges on the property. The term *assessment* clearly implies this; nothing short of a lawful assessment—one capable of enforcement—satisfies it. It was such assessments the plaintiff agreed to accept and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in the special manner designated; but this does not relieve the defendant from its obligation to pay.

If anything is wanting to render this construction clearer it may be found in the fact that the language involved is taken, word for word, from the statute, and must necessarily signify here what it does there. There the term assessment signifies and can only signify a proceeding which creates a charge on the property specified. The statute first provides for this proceeding and charge, and then for its transfer to the contractor. It is this charge which is to be transferred and which the contractor is to assume the risk of collecting. There is always some risk attending such collections. Prior liens or other causes may render the property insufficient to pay, and this only is the risk the statute and the contract made under it contemplated.

The defendant, having failed to make the required assessments, is in default upon its contract, and must make repa-

ration by paying the consequent loss. There is no hardship in it, and if there was it would afford no justification or excuse for shifting it to the plaintiff. The defendant has received full value for what he is required to pay, and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not only consistent with the intention of the parties, but avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it.

There is abundant authority for this construction. Hitchcock *vs.* Galveston, 96 U. S., 341, is in point. The city contracted with Hitchcock to do certain work upon the streets, for which he was to accept its bonds in payment. It had, however, no authority to issue the bonds, and, discovering this while the work was in progress, stopped it and declined to pay for what was done on the ground that its contractor had bound himself to depend upon this source of payment alone. The court, deciding that the contract contemplated and required valid bonds, and that as the city had failed to furnish such, held the contract broken and the city liable to pay from its treasury. In principle this case is not distinguishable from the one before us. The court says:

"It is enough that the city council had power to enter into the contract for the improvement; that such a contract was made; that the plaintiff has proceeded to furnish materials and do the work as well as assume liabilities; that the city has received and now enjoys the benefit of what he has done and furnished; that for these things the city promised to pay, and that after having received the benefit of the contract the city has broken its promise. It matters not that the promise was to pay in a manner not authorized by law. If the payment cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

White *vs.* Snell, 5 Pickering, 425; Hussey *vs.* Sibley, 66 Me., 192; Miller *vs.* Milwaukee, 14 Wis., 705; Bill *vs.* City of Denver, 29 Fed. Rep., 394, involved the same question

and were similarly decided. In Chicago *vs.* The People, 56 Ill., 327; Maher *vs.* Chicago, 38 Ill., 272; Louisville *vs.* Hyatt, 5 B. Mon., 200; Fisher *vs.* St. Louis, 44 Miss., 482, and Schofield *vs.* Council Bluffs, 68 Iowa, 695, the contractor agreed to look to assessments alone for payment, and yet the municipalities, having no authority to make them, were held liable to pay otherwise.

The numerous authorities cited by the defendant are not inconsistent with this construction. Peak *vs.* New Orleans, 139 U. S., 342, is based upon an essentially different state of facts. The city was not a party to the contract sued on and in nowise responsible for it. The work was done under a scheme devised by the State legislature and under a contract with officers designated by it for the drainage of swamp lands (a part only of which was within the city limits) for the benefit, primarily, of its owners. A careful examination of this case will show that it rests exclusively on these facts, though the last paragraph of the syllabus, read alone, would justify a different conclusion.

Horter *vs.* Philadelphia, 13 W. N. C., 40, and Dickson *vs.* Philadelphia, 14 W. N. C., 367, as we understand them, rest on the same principle. In the first the improvement was made under the State statute of 1855, which provides that the cost of such work shall be borne by adjoining property-holders. There was no authority, as it seems, to put it on the city. While the opinion of the court and report of the case are very brief, the decision appears to rest on this ground. If it were otherwise, the case would be in direct conflict with Chicago *vs.* The People, 56 Ill., 327. In Dickson *vs.* Philadelphia, 14 W. N. C., 367, the city appears to have had no connection whatever with the work. The statute under which it was done designated an officer to do it, empowering him to make contracts and collect money to pay the cost. That he held the office of city commissioner of highways is immaterial. He was the agent of the State in discharging his duties under the statute. Here again the

opinion of the court is very brief and the report of the case so meager that it was necessary to examine the records to understand what was decided, which we found to be no more than just stated.

The numerous other cases cited are equally inapplicable. In Belleview *vs.* Hohn, 82 Ky., 1, the municipality was without authority to pay except by assessments on adjoining properties. Sexton *vs.* St. Josephs, 60 Mo., 153, rests on the city's want of power to contract as she did. Casey *vs.* Leavenworth, 17 Kansas, 198, was decided on the fact that the city had kept its contract by collecting and applying the assessments named with reasonable vigilance. Newman *vs.* Sylvester, 42 Indiana, 146, was a suit against individuals and is inapplicable to the facts involved here. Other cases cited may be distinguished as easily.

The judgment is therefore reversed and the case remanded to the circuit court for further proceedings.

[Endorsed:] Opinion by Butler, J.

XIII. That thereafter, on the 12th day of December, 1894, plaintiff in error filed its petition for a rehearing in the said circuit court of appeals, and on the 21st day of December, A. D. 1894, the said petition was denied by said court.

Afterwards, on the 5th day of February, 1895, the mandate of the circuit court of appeals was filed in the said circuit court, and on the 4th day of June, 1895, the said circuit court, in accordance with said mandate and on motion of plaintiff's counsel, duly entered judgment against the defendant, your petitioner, for the sum of thirty-one thousand seven hundred and forty dollars and twenty-seven cents ($31,740.27) and costs, said decision of the circuit court of appeals being a final adjudication of said case in accordance with the principles laid down in—

Tyler *vs.* Hand, 7 How., 573.
Ferguson *vs.* Meredith, 1 Wall., 25.
Alley *vs.* Nott, 111 U. S., 472.

XIV. A certified copy of the entire record of the said case in the said circuit court of appeals is herewith furnished, in conformity with rule 37 of this honorable Court, relative to cases from the circuit court of appeals.

XV. Your petitioner is advised and believes that the said judgment of the said United States circuit court of appeals in the said cause is erroneous, and that this honorable Court should require the said case to be certified to it for its review and determination and in conformity with the provisions of section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said cause being made final in the said circuit court of appeals by the said act.

XVI. And your petitioner has no right of appeal or writ of error in this case for the reason that jurisdiction of the same was originally assumed by the United States court because of the diversity of the citizenship of the parties plaintiff and defendant.

XVII. The said cause was decided in the said circuit court of appeals on the supposed authority of the decision of your honorable Court in Hitchcock *vs.* Galveston, 96 U. S., 341. In that case the contractor agreed to accept bonds of the city in payment for his work. After the work had been undertaken, the city, finding it had no authority to issue the bonds, stopped the work and declared the contract void. In an action for damages for breach of the contract the city was held liable because under its general powers it had authority to do the work, and under its contract it assumed a liability and promised to pay therefor.

Now, the vital distinction between that case and your

petitioner's lies in the fact that in that case the debt was the defendant's, and the only question was as to the manner of the payment, while in the case of your petitioner the promise was not to pay in obligations of the defendant, but in claims against others, the collection of which was to be at the risk of the plaintiff without recourse to the defendant.

XVIII. The single question presented by the record in this case has not been decided upon the same state of facts by your honorable court, though in the case of Peake *vs.* New Orleans, 139 U. S., 342, a case different from this in some particulars, the court say:

"We trust that this court will never falter in its duty of brushing away all false pretenses and holding every municipality obedient to the spirit as well as the letter of all its contract obligations. At the same time it is equally the duty of this court, as of all others, to see to it that no burden is cast upon tax-payers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality; and when a contract for local improvements is entered into the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor."

XIX. The judgment and decision of the circuit court of appeals herein sought to be removed is in direct conflict with the said principle enunciated by your honorable Court in Peake *vs.* New Orleans; but said circuit court of appeals has failed and refused to apply and follow the principle so laid down by your honorable Court, and which principle, we respectfully insist, is peculiarly applicable to the facts of your petitioner's case.

XX. Your petitioner respectfully submits that the question presented by this record should be authoritatively and

finally adjudged by this honorable Court upon and after a full presentation to the Court of the merits thereof. It is a question of gravity and importance not only to your petitioner, but to every municipality in the land. Street paving is being done in every city of any consequence, and under the modern doctrine of assessments for special benefits contracts similar to this are entered into everywhere, and the mass of diverse opinions on the subject by local and State courts (reference to many of which is given in our brief herewith submitted) renders it of the highest importance to the citizens and tax-payers of every municipality in the country that the highest Court in our land shall adjudge the question involved in this case, and thus lay down an authoritative and sound rule for the guidance of inferior tribunals in litigation of a similar nature.

XXI. Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States circuit court of appeals for the third circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein entitled "The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg, defendant in error, No. 16, September term, 1894," to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court

of appeals in the said case and every part thereof may be reversed by this honorable Court.

And your petitioner will ever pray, &c.

THE CITY OF HARRISBURG,
By WM. H. MIDDLETON,
City Solicitor.

STATE OF PENNSYLVANIA, }
County of Dauphin, } ss:

Wm. H. Middleton, being duly sworn, says that he is the city solicitor of the City of Harrisburg, the petitioner above named, and as such had personal charge for it of the case in the foregoing petition mentioned in the circuit court of the United States for the eastern district of Pennsylvania and in the United States circuit court of appeals for the third circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

WM. H. MIDDLETON.

Sworn to and subscribed before me this 6th day of July, 1895.

[SEAL.] WM. M. HARGEST,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1895. No. —.

To Messrs. CHARLES H. BERGNER, GEORGE FRED'K KEENE, and A. S. WORTHINGTON, *Attorneys for the Barber Asphalt Paving Company:*

Please take notice that on Monday, the 14th day of October, 1895, at the opening of the court, or as soon thereafter as counsel can be heard, the petition of which the foregoing

is a copy will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

WM. H. MIDDLETON,
City Solicitor.

Service of a copy of the within notice and also of the petition for writ of certiorari received this 6th day of July, 1895.

A. S. WORTHINGTON,
GEO. FRED'K KEENE,
C. H. BERGNER,
Attorneys for the Barber Asphalt Paving Company and of Counsel.

[Endorsed:] The Barber Asphalt Paving Company, plaintiff in error, *vs.* The City of Harrisburg. Petition of the City of Harrisburg for writ of certiorari to U. S. circuit court of appeals for the third circuit. Wm. H. Middleton, attorney and counsellor at law, Harrisburg, Pa.

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SUPREME COURT U.S.
FILED
OCT 14 1895
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. —. 772

THE BARBER ASPHALT PAVING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY OF HARRISBURG.

Brief in Support of Petition of the City of Harrisburg for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM H. MIDDLETON,
City Solicitor.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. —.

THE BARBER ASPHALT PAVING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY OF HARRISBURG, DEFENDANT IN ERROR.

ON PETITION OF THE CITY OF HARRISBURG FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF WM. H. MIDDLETON, CITY SOLICITOR.

STATEMENT OF FACTS.

This is an application for a writ of certiorari to the circuit court of appeals of the third circuit under the provisions of the act of Congress of March 3, 1891, chapter 517, section 5.

The record in the cause shows that the Barber Asphalt Paving Company did certain paving for the defendant in error under an ordinance which provided that the cost of

the work should be paid out of the assessments levied against the abutting properties," and that the city of Harrisburg shall under no circumstances be held responsible for the payment of any part of the cost of said improvement," and under a contract which provided for the transfer of the assessment claims to the paving company and containing the express covenant "that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

The Pennsylvania statute (act of May 24, 1887, P. L. 204–261), under which the said work was done, having been declared unconstitutional by the supreme court of that State, the assessment claims became worthless, and the attempt of the city to secure to the contractor its compensation by suits or re-assessment claims was rendered vain by another decision of said supreme court, holding that said work was not such an original improvement as the property-owners could be charged for.

The paving company, claiming that the city is liable to it for the amount of the uncollectible assessments, brought suit in the United States circuit court for the eastern district of Pennsylvania, and having filed its statement of claim, to which the city demurred, the court, Dallas, C. J., entered judgment in favor of the city of Harrisburg on the demurrer.

Thereupon a writ of error having been sued out to the United States circuit court of appeals for the third circuit by the plaintiff and the cause duly heard therein, said court, in an opinion filed, reversed the judgment of the lower court. Thereupon your petitioner duly prayed said court for a rehearing in the cause, which prayer was on the 21st day of December, 1894, refused.

The city of Harrisburg, feeling that great injustice has been done it by the said erroneous decision and believing

that the question of law involved in the case is of sufficient gravity and importance to warrant the review of said cause by the Supreme Court of the United States, has prayed that this honorable Court should require the said cause to be certified to it for its review and determination and in conformity with the provisions of section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said cause being made final in the said circuit court of appeals by the said act, and your petitioner has no right of appeal or writ of error in this case, for the reason that jurisdiction of the same was originally assumed by the United States court because of the diversity of citizenship of the parties plaintiff and defendant.

ASSIGNMENTS OF ERROR.

1. The learned court erred in directing judgment for the plaintiff on the demurrer and reversing the judgment of the circuit court.

2. The learned court erred in not directing judgment for defendant on the demurrer and in not affirming the judgment of the circuit court.

ARGUMENT.

The opinion of the court below is based on the assumption that the city agreed to make and deliver assessments that were valid and legal.

We submit that nothing in the pleadings warrants this assumption. Nowhere on the face of the record can be found any such covenant.

The record shows that the assessments had been made before the contract was entered into, and all the city agreed to do was to assign those assessments already made; the

paving company to take all the risk as to their validity and in no event to hold the city liable.

An inspection of page 13 of the Record will show the passage of joint resolution of councils, introduced May 30, 1887, authorizing a board of viewers to make an assessment of the cost of the work, which assessment was duly made and reported to councils on August 8, 1887, as will be seen on pages 16 to 19 of the Record, and on August 10, 1887, the ordinance No. 200, file of select council, was duly approved by the mayor (page 11 of the Record), wherein it is ordained (page 15 of the Record), "The assessments for the paving and curbing of said street shall be, and are hereby, made and levied upon the real estate upon both sides thereof," while the contract between the parties was signed by the paving company on August 13, 1887, and agreed to by the councils on behalf of the city on September 12, 1887. (Pages 6 and 7 of the Record.)

That the parties intended this particular assessment (made before the contract) admits of no question, because the city did assign and the paving company did accept it, and because the reference thereto in the contract is in the perfect tense. "Will pay * * * out of the assessments made and levied," "will assign * * * the municipal claims made and levied" is the language used (page 5 of the Record) and is the only language used on that subject in the whole contract.

It will thus be seen that the paving company agreed to accept assessments already made with full knowledge of their legal invalidity, and agreed to have no recourse against the city in the event of their failure to collect them. Such was its contract, and neither law nor equity should have power to change it.

The court below seemed to ignore entirely that clause of the ordinance which provides, "and that the city of Harrisburg shall under no circumstances be held responsible for the payment of any part of the cost of said improve-

ment." Nowhere in the opinion filed is that clause given any consideration, and yet the contract was based on the ordinance, and the ordinance was as much a part of the contract as if written therein.

The holding of the court below that "the plaintiff had no reason to doubt the correctness of this belief," meaning the belief as to the power of the city to assess the cost of the work, is contrary to the rule that every man is bound to know the law. Plaintiff below is chargeable with full knowledge of the restricted power of the city, and with full knowledge and means of knowledge of the legal invalidity of the particular assessments it voluntarily took the risk thereon and agreed to accept them.

The court below is mistaken in saying "after entering into the contract the defendant went through the form of making assessments, 'and that it undertook unconditionally to make and transfer assessments,' and that the parties contemplated valid charges on the property. It was such assessments the plaintiff agreed to accept and assume the risk of collecting."

As we have already shown, the assessment was made before the contract was entered into, and the city only undertook to deliver such assessments as had already been made. Nowhere in the contract is there any agreement to make assessments, and if the parties had intended a warranty of the validity of the assessments they would have so contracted. All the rest of their intentions are set forth in clear and explicit language, and if such had been their intention it would have been so set forth also.

The court also say "there is always some risk attending such collections. Prior liens or other causes may render the property insufficient to pay;" but the parties could not have contemplated such risk, because the very act of assembly under which they contracted provides that such assessments shall have priority to any other lien or incumbrance, and shall not be discharged by any judicial sale,

except as to such portion of the proceeds of said sale as may be applied to the payment of such liens. (Act of 1887, page 254.)

Therefore by virtue of the act of assembly under which they were contracting there was practically no such risk as the court speak of, and the parties could only have intended and did actually intend the risk of the validity of the assessments.

There was nothing strange or unusual in the paving company contracting to take the risk of the validity of the assessments or to take the risk of the validity of the law, because the law had just been enacted a few months before and had never been passed on by the courts, and, as the constitution forbids special legislation in Pennsylvania, municipalities are fully warranted in acting cautiously under an act like this (covering 57 pages of the statute book) and legislating for different classes of cities) until it has been judicially construed. Therefore it was the proper thing for a city with a large debt and no money to pay for an improvement like this to say to the contractor, Yes; you can do the work if you will take all the risk as to the validity of the law and of the assessments. And what more appropriate language could be used to effectuate that intent than the stipulation in the ordinance "that the city of Harrisburg shall under no circumstances be held responsible for the payment of any part of the cost of said improvement," and the covenant in the contract, "and the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not."

In the face of such language, how can the finding of the court below, that its forced and strained construction was "consistent with the intentions of the parties," be upheld and approved?

Again, the court speak of "the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it."

There is no injustice in law or morals in holding parties to their contractual obligations; nor is there any injustice in the city holding defendant's property without paying for it if defendant has so agreed.

It would be, however, we submit, a grave injustice to the tax-payers of the city to make them pay to the defendant something that defendant agreed they should not pay. It is placing a burden on the municipality which it never intended to assume and making it pay for work which it would never have consented to have had done at its own cost and work which would never have been done but for defendant's agreement to look to third parties for payment.

The position that the contract can be construed to mean that the city agreed that the assessments should be legal and valid is ably and conclusively answered in the opinion of Judge Dallas, of the circuit court, wherein he says, after reciting the facts: "But does it follow from this that it is entitled to recover from the defendant?" If it is, as it is not alleged that the defendant has committed any wrong, it must be because it has by contract, either express or implied, assumed the liability now sought to be fixed upon it. The pertinent part of the only express contract has been fully quoted. It is impossible to find in that any undertaking by the defendant to pay otherwise than by special assessments, and this undertaking is coupled with that of the plaintiff to accept the said assessments in payment. But the contention of the plaintiff's counsel, as I understand it, though not so expressed, amounts to this: That as incident to the express contract there is an implied warranty by the defendant that it had lawful power to levy the assessments, and that a breach of that warranty having been shown a right of action accrued.

The theory upon which this position is founded might be accepted even as against a municipality without conceding its applicability to this case, for it is never admissible to imply a contract at variance with that which the parties

have expressed, and in the present instance the express intent precludes the implication of the warranty alleged.

Since the year 1874 (P. L., page 230) the defendant had had authority to apply its general revenues to paving its streets. On May 24, 1887, the act was approved (Penna. Statute, *supra*) by which it was intended to confer upon it the power to charge the cost upon the abutting properties. The defendant's supposed right to do this was derived solely from the last-mentioned act, and this was known to the plaintiff as well as to the defendant when, on August 13, 1887, within three months after the passage of the empowering act and admittedly with reference to it, the contract in suit was entered into.

The plaintiff desired to do the work and the defendant, of course, desired to have it done, but was not willing to impose the expense upon its treasury. Hence, with the manifest object of excluding the possibility of inference that the defendant might be required to make payment from its general resources, it was provided that it should pay by special assessments, and that "the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not." The agreement was not merely that the defendant would pay in the manner stated, but also that it should not be liable to pay in any other manner. To me this seems a reasonable and natural construction of the language used, and if this understanding is correct it results that the warranty contended for cannot be implied, and that the plaintiff's case must fail for want of any contract to support it.

THE DECISIONS IN THE UNITED STATES COURTS.

The few cases in the United States courts are in harmony with the defendant's contention here. In Peake *vs.* New Orleans, 139 U. S., 342, your honorable Court say:

"We trust that this Court will never falter in its duty of brushing away all false pretenses and holding every munici-

pality obedient to the spirit as well as the letter of all its contract obligations. At the same time it is equally the duty of this Court, as of all others, to see to it that no burden is cast upon the tax-payers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality, and when a contract for local improvements in a municipality is entered into the contractor must look to the special assessments and to them alone for his compensation; and if they fail, without dereliction or wrong upon the part of the corporation, neither justice nor equity will tolerate that it be charged as debtor therefor."

In Brown *vs.* Memphis, 20 Wallace, 298, the city was held liable, but there was an express guarantee by the city for the payment of the assessments made against the property-owners. In Hitchcock *vs.* Galveston, 96 U. S., 341, the contractor agreed to accept bonds of the city in payment for his work. After the work had been undertaken the city, finding it had no authority to issue the bonds, stopped the work and declared the contract void. In an action for damages for breach of the contract the city was held liable, because under its general powers it had authority to do the work, and under its contract it assumed a liability and promised to pay therefor.

Now, the vital distinction between that case and your petitioner's lies in the fact that in that case the debt was the defendant's, and the only question was as to the manner of the payment, while in the case of your petitioner the promise was not to pay in obligations of the defendant, but in claims against others, the collection of which was to be at the risk of the plaintiff without recourse to the defendant.

THE DECISIONS IN PENNSYLVANIA.

The law in Pennsylvania as to municipal liability in cases like this is well settled.

In Horter *vs.* Phila., 13 W. N. C., 40, a case in which the city paved a street and the contractor agreed to accept the

assessments against the abutting property-owners and in case of failure to collect the same not to have resort against the city, the supreme court say:

"In this case the plaintiff expressly agreed in the event of a failure to collect the assessment bills that no recourse should be had against the city. The plaintiff knew the restricted power of the city and had the same knowledge it had of the legal invalidity of the particular assessment in question. The city did all which she agreed to do. With this full knowledge and means of knowledge the plaintiff voluntarily assumed the risk of collecting the assessment. Having failed in the attempt so to do, they cannot now repudiate their agreement and make the city liable to them."

In Dickinson *vs.* Phila., 14 W. N. C., 367, another similar paving case, the supreme court, finding that the contractor agreed to accept the assessments in payment for his work and take the risk of collection, say:

"The exemption of the city from all liability to pay for the paving is thus stated in clear and unmistakable language. The city shall incur no expense, and the contractor shall look to the owners of property fronting on the street for his work and materials. If he has failed to so collect his claim, in the language of Horter *vs.* City (*supra*), he cannot now repudiate his agreement and make the city liable to pay him."

In both Horter *vs.* Phila. and Dickinson *vs.* Phila. it was held that the act of assembly was unconstitutional as to the assessments which the contractor had been unable to collect and for which the suits had been brought, because the land sought to be charged belonged to a cemetery company in the one case and was of a rural nature in the other case.

Our case here is exactly similar in principle; the law did not authorize the assessment in the Philadelphia cases and it did not authorize it in our case.

In Chambers *vs.* Jaynes, 4 Pa., 39, it is said:

"When it is the original contract of the parties that the creditor shall look to a certain fund alone, upon the failure of that fund he cannot have recourse beyond it to the personal responsibility of the debtor.

"When by an article of agreement part of the price of the erection of certain houses was to be paid out of the rents of said houses quarterly, the whole amount to be applied to that purpose, and the houses were burned down soon after they were completed and rented, in covenant to recover that part of the price the plaintiff should allege and prove that the defendant had received rents from the houses or should on account of default or negligence be charged as if he had received the same."

In deciding this case Judge Grier says (page 44):

"This is not the case of a previous debt for which the rents of the houses have been pledged or mortgaged as security and where the loss of the security would not affect the plaintiff's right to a remedy on the original debt or duty. It is the original contract of the parties that plaintiff shall look to this fund alone and not to the personal responsibility of defendant, and neither law nor equity can change their contract.

"Where parties have entered into written engagements with express stipulations it is manifestly not desirable to extend them by implications. The presumption is that having expressed some they have expressed all the conditions by which they intended to be bound under that instrument." (Broome's Legal Maxims, 8th ed., page 652.)

Expressum facit cessare tacitum.

THE DECISIONS IN OTHER STATES.

In other States the authorities on the subject of municipal liability are conflicting.

The general rule being that a municipality is not liable on implied contracts, a duty to pay beyond the terms imposed by an express one can scarcely be inferred.

Burril *vs.* Boston, 2 Clifford C. C., 590.

Dillon on Mun. Corp., 1, sec. 461 (4th ed.).

Another conclusion to be drawn from the cases is that whenever the city has been held as primarily liable to the contractor for the cost of local improvements, and the charter or ordinance under which the contract was made provided that the expense should be assessed against the property-owners, it was in consequence of some default or negligence on the part of the city, either in not having levied the assessments properly or from neglect in collecting them, or else from their misapplication when collected.

In this case the failure to collect arose from a cause entirely beyond the control of the city. It was a defect in the original law, equally patent to both contracting parties.

In Belleview *vs.* Hohn, 82 Ky., 1 (cited in Dillon on Mun. Corp., page 365, note 1, 4th ed.), it was held that, where a contractor for the improvement of streets agreed that he would not look to the town in any event for compensation, and it was afterward decided that the contract was *ultra vires* and void, and that the lot-owners were not liable for the work, the town was not liable to him by reason of its inherent power to improve streets.

In Newman *vs.* Sylvester, 42 Ind., 106, it is held that if the members of common council of a city in passing an ordinance and letting a contract for the improvement of a street act in good faith under a misapprehension, they and the contractor, as well as the adjacent owners of real estate, believing the street to be within the corporate limits of the city, the contractor having like knowledge with the members of council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits.

In Saxton *vs.* St. Joseph, 60 Mo., 153, it was held that the city was not liable to the contractor for a sum expended in attempts to collect assessments from the property-owners where the assessments were uncollectible by reason of a defect in the proceedings in council.

In Tournier *vs.* Municipality, 5 La. An., 298, the city was held liable to the contractor because he was unable to collect the assessments for reasons for which the municipality was responsible.

In Kearney *vs.* City of Covington, 1 Metcalf, 339, although the contract provided that the contractor was to look to the property-owners for payment, the city was held liable on account of its breach of duty in not taking the necessary steps to render the property-owners liable.

In Beard *vs.* City of Brooklyn, 31 Barb., 142, the city failed to make any attempt to collect the assessments and was held liable. The court, however, said:

"It cannot be thought that the city is primarily liable for the payment of the money due on the contract."

"The councils do not covenant to pay for the services. They are one of the contracting parties in execution of a statute, rather as agents of the property-owners than representatives of the city. The work is for the special benefit of the lands, and the expenses are a special charge thereon, but when the city positively declines to take any steps to collect them it constitutes a breach of duty for which it is liable."

In Cummings *vs.* Mayor of Brooklyn, 11 Page, 596, the city was held liable because it failed to levy the assessments.

In Casey *vs.* Leavenworth, 17 Kansas, 189, the special tax levied to pay for the improvement failed, and it was held that the city was not liable to the contractor because he was bound to see that the special tax was properly levied.

In Craycraft *vs.* Selvage, 10 Bush., Ky., 696, the council not having taken the proper steps to make the assessments legal, it was held that the contractor was bound to know this at his peril, the fault existing at the time of the contract.

In Argenti *vs.* San Francisco, 16 Cal., 255, no ordinance

authorized the improvement, but a contract was let, and the assessments levied and collected, and the work paid for in city warrants.

The city refusing to pay the warrants, suit thereon was brought and the city held liable, because it had collected the assessments and because it had become liable by virtue of an express contract.

This cause intimates very clearly that there is no implied liability beyond the terms of the contract.

In Byrne *vs.* East Carroll, 45 La. An. (12 Southern Rep., 521), it was held that a contractor to construct a public improvement for a parish, under a contract providing that he shall be paid from a special fund if voted on favorably by the voters at a special election, cannot ignore the provisions for such payment and recover from the parish where the election is ordered and held in contravention of a statutory prohibition.

In Goose River Bank *vs.* School Twp., 44 N. W. Rep., 1002 (N. D.), it was held that when a contract is expressly prohibited or declared void by statute, retention of the fruits of such contract will not subject a municipality to liability under the contract or on a *quantum mèruit.*

In Davis *vs.* Des Moines, 71 Iowa, 500; 32 N. W., 470, it was held that a contract of a city with a contractor for the building of a sewer, in which the contractor agrees to accept in full payment certificates of assessments against property adjacent to the sewer, is not a city debt.

In Maher *vs.* Chicago, 38 Ill., 266 (1865), there was no express contract, and the special assessment being invalid the city was held liable.

But in Chicago *vs.* People, 48 Ill., 416, the contract expressly stipulated that the contractor would look for payment only from the proceedings of the assessments levied and to be levied, he agreeing to make no claim against the corporation except from the collection of such assessments. Held, in a proceeding for a mandamus to compel payment,

that such contractor must abide by his agreement, it appearing that the corporation was, in good faith and with reasonable diligence, proceeding to make collections by means of such assessments.

In Bucroft *vs.* Council Bluffs, 63 Iowa, 646, the city was held liable to the contractor, there being no authority to make the assessment; but Seever, J., says:

"There is no provision of either the contract or statute which provides that in no event shall the city be liable to pay for the grading; adjudged cases, therefore, in which this fact appears are distinguishable from this case."

In Scofield *vs.* Council Bluffs, 68 Iowa, 695, the city was held liable to the contractor, the certificates of assessments being void, the court holding that where a city issues in payment for work certificates of assessments * * * it impliedly agrees that they are not invalid.

It is needless to say that there was no agreement on the part of the contractor that the city should not be liable.

In Chicago *vs.* People, 56 Ill., 327, the invalid assessment was against railroad property which by previous contract of the city was wholly exempted from such assessment.

"The fact of the existence of the contract was peculiarly within the knowledge of appellant." "If both parties were chargeable with notice of its existence, no mistake as to its effect, whether mutual or unilateral, would afford any ground for relief in equity. But if Travers & Company entered into the contract to do the work in ignorance of the dealings between appellant and the railroad company, and upon the supposition that the assessment upon the property of the railroad company was valid, as it would have been but for the act of appellant exempting it, and were induced to agree to accept the agreement of appellant to pay when the assessment was collected, then the mistake would be one of fact on their part, which would operate as a surprise, and equity would relieve if they had taken the proper steps to disaffirm the contract, which it seems they did not do." [The city was the appellant and the judgment was reversed.]

In Louisville *vs.* Hyatt, 5 B. Mon., 200, it was a fact that either a petition from the property-owners to be assessed or the unanimous action of the mayor and councilmen in council assembled was necessary to make the ordinance or official action of the city valid.

This was not had, and the city was properly charged by reason of its own negligence.

In Fisher *vs.* St. Louis, 44 Missouri, 482, it was said:

"It is not here claimed (by the defense) either that the bills were valid, or that their acceptance constituted a payment and satisfaction of the plaintiff's demand.

"It is claimed, nevertheless, that the city had the requisite power to issue legal tax bills binding on the property-owners, and that having that power it was not bound to pay in any other manner than in the bills, as stipulated in the contract, and that the plaintiff can therefore have no right of action, notwithstanding the invalidity of the bills delivered to him, 'until he demands other bills and they are refused him. * * * The objection is that the plaintiff failed to return the void bills and demand others. This fact, if of any materiality, should have been pleaded."

"But we are not inclined to regard the fact as material. It was the duty of the defendant to correct its own mistakes and to tender payment of the admitted indebtedness, whether in money or in tax bills."

In Bill *vs.* Denver, 29 Fed. Rep., 344 (per Brewer, J.):

"It is true that its power to proceed in the premises depended upon the petition of a majority of the property-owners, but no tribunal is in terms provided to determine whether such petition has been filed, and there being no statutory provision for a tribunal to so determine, when the city council, as the general representative of the city, with power to act thereon, determines by its action that such a petition has been filed, these parties have a right to rely upon that and say that the city is estopped thereafter to deny that such petition was filed."

The paving company in its *narr.* alleges that both parties believed that the city had power to make and deliver

valid assessments; in other words, that both parties believed the statute of 1887 was constitutional. Such a mutual mistake of law could not, however, relieve either party from its contract.

This subject is considered in 15 American and English Encyclopædia of Law, pages 634 to 645, and the authorities thereon fully treated and considered in copious notes.

It is there said:

"It is laid down as a general rule that such a mistake, unconnected with a mistake of fact, and where there are no indications of fraud, imposition, or undue advantage entering into the agreement, will not be corrected by a court of equity."

And again, on page 644:

"Where the parties to an agreement have equal means of acquiring knowledge, and no fraud or deception is used, equity will not grant relief for a mistake either of law or fact."

In the case at the bar the city has not been negligent in any particular, nor does the paving company so contend. In every respect it has complied with the terms of the contract and ordinance, and has made every effort to enforce the collection of the assessments, and if the assessments are not collectible, such condition has not been brought about by any act or default of the city, but by causes over which the city had no control.

If the law of Pennsylvania did not permit the cost of paving Market street to be assessed on the abutting property-owners, the paving company was bound to know the law, and with full knowledge that the property-owners might refuse to pay or successfully defend suits brought against them, it took the risk.

To the paving company's contention that the city had general power to improve streets and pay for the cost thereof, and therefore should pay for this work, it is suffi-

cient to answer that the city did not exercise that power, nor did it intend to, nor did the plaintiff expect it to or ask it to.

The decision of the lower court in effect reforms this contract by striking out the clause relating to the manner of payment, thus making a new contract for the parties. Where parties who are *sui juris* make contracts not ambiguous in terms, not contrary to law or public policy, and there is no allegation of fraud, accident, or mistake, they cannot avoid their deliberate act simply because the transaction did not turn out as profitable as they expected.

The decision of the lower court places on the city a liability which it never assumed or intended to assume, and by its legislative act declared it did not and would not assume, and which the plaintiff below in its solemn contract, made under and by virtue of said legislative act, agreed and covenanted it should not assume.

In conclusion, we respectfully urge that the decision of the circuit court of appeals is directly in conflict with the expression of your honorable Court in Peake *vs.* New Orleans, *supra.*

That our case is of sufficient gravity and importance to warrant its review by the highest court in the land because the question of street paving and contracts relating thereto is one of the greatest and most important matters in municipal government—a matter that may affect every municipality of any size in the whole United States—and in view of the mass of inharmonious opinions by the different State courts, it would be of lasting public benefit that your honorable Court should pass on the question involved and furnish an authoritative rule of guidance, binding on the Federal courts and of persuasive authority with the State courts.

Respectfully submitted,

WM. H. MIDDLETON,
City Solicitor.

Supreme Court of the United States.

October Term, 1895.

No. [illegible]

THE BARBER ASPHALT PAVING CO.,
Plaintiff in Error,

v.

THE CITY OF HARRISBURG.

Brief for the Plaintiff in Error in Opposition to Petition for writ of Certiorari.

CHARLES H. BERGNER,
A. S. WORTHINGTON,
Attorneys for Barber Asphalt Paving Co.

H. L. McQUEEN, PRINTER.

Supreme Court of the United States.

October Term, 1895.

THE BARBER ASPHALT PAVING COMPANY,
Plaintiff in Error,
v.
THE CITY OF HARRISBURG.
} No.

BRIEF ON BEHALF OF THE BARBER ASPHALT PAVING COMPANY,

in opposition to the

Petition of the City of Harrisburg for a Writ of Certiorari.

Statement of the Case.

This was an action at law in the Circuit Court of the United States for the eastern district of Pennsylvania, by the Barber Asphalt Paving Company against the city of Harrisburg to recover a balance alleged to be due from the city to the Barber Company for work done under a contract with the city in laying an asphalt pavement on Market Street in Harrisburg. The defendant demurred to the plaintiff's complaint or statement (Record, 19). The Circuit Court sustained the demurrer and entered judgment for the defendant (24). To revise this judgment the Barber Company obtained a writ of error from

the Circuit Court of Appeals, Third Circuit. In that court, on the 22d day of November, 1894, a judgment was entered reversing the judgment of the Circuit Court in favor of the defendant, and remanding the case to the Circuit Court for further proceedings (30). In the opinion which was filed at the time this judgment was entered the Circuit Court of Appeals decided the only question that was involved in the case in favor of the plaintiff (26, 30). On the 12th of December, 1894, the counsel for the city of Harrisburg filed in the Circuit Court of Appeals a motion for a rehearing (31, 34). This motion was denied December 21, 1894 (34).

On the 5th of February, 1895, the Circuit Court of Appeals issued its mandate to the Circuit Court (34, 35). Pursuant thereto as stated in the petition (page 17, paragraph XIII) a judgment in favor of the plaintiff was entered in the latter court, but that judgment is not in the record filed here.

The only controversy involved in this case related to a question of law. Harrisburg since 1874 has had the legal right to pave streets at the expense of the general revenue. An act of the Pennsylvania legislature, dated May 24, 1887 (Pamphlet Laws, 1887, p. 256), divided the cities of that State into seven classes, and provided a form of government for each class. The act was very minute in its details, and had evidently been prepared with great care. By this act cities of the class to which Harrisburg belonged were authorized in certain cases to pave and otherwise improve streets at the expense of the owners of abutting property, and to levy and collect assessments upon such property accordingly. These assessments were made liens upon the property and the city was authorized to assign them to the contractor. Article XIX of the act contained the following section, out of which this controversy arises:

"Section 21. In all contracts for improvements, the cost of which is to be paid by assessments upon the property abutting or benefited, the city may enter into an agreement with the contractor that he shall take an assignment of such assessments in payment of the amount due him under the terms of his contract, and in such case the city shall not be otherwise liable under such contract, whether said assessments are collectible or not."

In the contract between the Barber Company and the city of Harrisburg, under which Market street was paved by that company, a provision was inserted substantially in the words of the foregoing section. After the work had all been done to the satisfaction of the city and accepted by it, and after a part of the assessments had been paid to the city and the amount thus realized had been turned over to the contractor by the city, some of the property owners who had not paid their assessments disputed the validity of the same. Litigation followed; and in these and other cases which came before the Supreme Court of Pennsylvania that court held that the entire act of 1887 was in violation of the constitution of Pennsylvania and therefore void (Harrisburg *v.* Shoemaker; Harrisburg *v.* Berghaus; and Ayer's appeal, 122 Pa. St., 285, 289, 266).

Of course this invalidated all the assessments and rendered it impossible for the Barber Company to collect in the manner provided by the contract the balance due it.

The decisions just referred to were rendered in January, 1889. In May, 1889, the legislature of Pennsylvania passed an act authorizing a re-assessment in such cases as this (Pamphlet Laws, 1889, p. 272). In pursuance of this last-mentioned act the city of Harrisburg undertook to make a second assessment for this Market street pavement. But the Supreme Court of Pennsylvania held this assessment invalid also upon the ground that the laying of the pavement in question was in the nature of repairs

to an existing pavement and not an original improvement; that court having previously determined that the constitution of Pennsylvania prohibits *repairing* at the expense of the abutting property (Harrisburg *v.* Segelbaum, 151 Pa. St., 172). Thereupon this action was brought.

ARGUMENT.

There is no Question of General Interest or Importance Involved in this Case.

The Pennsylvania act of 1887 by its terms authorized the councils of Harrisburg to assess the cost of this Market street pavement against the abutting property; to enter in the proper office a statement of the assessment and the property covered by it, so as to make a lien upon each parcel for the amount of the assessment against it, and to assign such assessments and liens to the contractor. The above quoted section 21 of Article 19 of that act made provision for an agreement between the contractor and the city that the former should take an assignment of such assessments in payment of the amount due him, and that in such case the city should not be *otherwise* liable, whether the assessments were collectible or not. In the contract involved in this suit the parties incorporated into their agreement the precise terms of this section (5).

The meaning of this clause is the only thing involved in the suit. The Circuit Court of Appeals held that, as nothing appeared to the contrary, it must be assumed that the parties attached the same meaning to this language in the contract that it had in the statute from which it was taken. The Supreme Court of the State held the whole act void. The contention of the Barber Com-

pany, which was sustained by the Circuit Court of Appeals, was that it could not be presumed that the legislature intended to provide by the law for the contingency of the law itself being void.

It seems to us reasonably clear that this decision was correct. Clearly the clause in question in the contract was not intended, and no act of construction can make it appear as the intention, to exempt the city from liability where the assessments are uncollectible because of the lack of power to levy them, or the failure of the city to do so properly. The correct meaning and construction must be that the city shall not be held liable for such assessments as may be valid, but are uncollectible by reason, for instance, of prior liens or because the assessment amounts to more than the value of the property. And this proposition is not controverted by the statement in petitioners' brief that such construction can not have been in contemplation, because the same act of assembly provided that assessment liens should have priority in date of payment to any other liens upon the property. Such provision by its terms only refers to liens entered against property after the passage of the act of 1887, *supra;* liens existing at the time of the passage of the act and incumbering property to its full value were not displaced or made subordinate to a new lien created by such statute. It was to meet such cases that the act of assembly provided for the risk of collection being assumed by the contractor, and no other.

But whether the decision of the Circuit Court of Appeals on this point was correct or not it is a question which appears never to have arisen in any other case in Pennsylvania or anywhere else. It is such a question as is not likely to arise again in the future anywhere. There is therefore no reason for asking this court to review the decision of that court.

In the petition filed here on behalf of the city of Harrisburg and in the brief filed in support of that petition it is assumed that the question involved is one which is of great interest to "every municipality in the country." The case is discussed as though there was involved the general question whether in any case when a contractor has agreed to look solely to the special assessments for his compensation, and they fail, he can afterwards sue the city; but no such general question is involved here. This case has been determined upon the special facts above set forth—the act of the legislature authorizing assessments and their assignment to the contractor in full of the amount due him; the incorporation of that clause of the act in the contract between the parties; and the action of the Supreme Court of Pennsylvania in holding the act itself void. There is no other case pending, even in Pennsylvania, in which this question is involved. No other such case can now arise in that State. There is, therefore, no reason for asking this court to interfere in this case, that would not apply in three-fourths of the cases decided by the Circuit Courts of Appeals.

The Opinion of the Circuit Court of Appeals in this Case is not Antagonistic to the Decisions of this Court.

As to the case of Hitchcock *v.* The City of Galveston (96 U. S., 341) we do not care to add anything to what is said in the opinion of the Circuit Court of Appeals in discussing the argument now made here on behalf of the City of Harrisburg (28, 29). But as to what is said in the brief in support of this petition regarding the case of Peake *v.* New Orleans (139 U. S., 342) we must remind the court that in that case it distinctly declined to express any opinion upon the general proposition relied upon

here now by the counsel for the City of Harrisburg. In that case Mr. Justice Brewer, delivering the opinion of the majority of the court, says (p. 352):

"There is a wide divergence in the authorities as to the circumstances under which the liability of a city to a contractor for local improvements arises in case of non-payment of the special assessments. *Into that field of inquiry we do not care to enter.*"

In the paragraph of the majority opinion in Peake *v.* New Orleans, which is quoted in the brief on the other side, the central idea is that where work has been done which is for the benefit of persons owning land in the vicinity of the improvements the taxpayers of the city generally who have received no benefit from the work should not be held liable when the contractor has agreed to look to the special assessments. In the present case the special assessments failed finally because it was held by the Supreme Court of Pennsylvania that this work *was for the benefit of the city generally,* and in no way inured to the special benefit of the owners of abutting property (Harrisburg *v.* Segelbaum, 151 Pa. St., 172); so in this case the judgment that is complained of requires that those who received and hold the benefit of this contractor's labor shall pay him for it, while in Peake *v.* New Orleans the effort was, after the contractor had failed to recover from the parties benefited, to recover from those who had not been benefited and who were under no obligation of any kind to make the contract good.

This paragraph in the opinion in Peake *v.* New Orleans is construed by the counsel for the petitioner to lay down a proposition that is in conflict with every case on the subject—that is that in no way can a municipal corporation bind itself to pay for local improvements where it is

authorized to make special assessments. But the slightest consideration of the facts in Peake *v.* New Orleans shows that the opinion of the court can not be so construed and that the case has no pertinency here. In that case, the officers specially charged by the legislature with the duty, as well as the city itself, had been engaged for years in collecting the assessments and had failed to get in the amount required to pay the contractor only because the land assessed was not worth the amount of the assessments; so that in effect the city was called upon to pay the difference between the amount of the assessment liens and their value. Moreover, the legislature of the State provided for the doing of the work and imposed certain duties in that connection upon certain officers of the city of New Orleans, and it was held that the city was not liable because it, as a municipality, had had nothing to do with the making of the contract and had no control over the work.

As to the Alleged Mistake of the Circuit Court of Appeals in Holding that the Assessments Were Made After the Contract had been Entered into Instead of Before.

We are at a loss to know what difference it can make whether the assessments were made before or after the contract was signed. To us the legal question is precisely the same in either case. If the city, in the contract, agreed that it would thereafter make assessments and assign them to the contractor and was bound thereby to make assessments which would have some validity and not be wholly void, so if it agreed to turn over assessments which it had already made, it would be bound to assign papers which would be assessments in fact and not in a legal sense blank pieces of paper. It should be noted here that this

alleged mistake on the part of the Circuit Court of Appeals was brought to the notice of that court in the motion for a rehearing, which was made and submitted by the city (31).

But we submit that it is not correct to say that the assessments in this case were made before the contract was signed. The record shows (15) that viewers made a report to the councils of an assessment upon property holders under date of August 8, 1887 (18), which report and schedule of assessments were approved, ratified and confirmed by an ordinance of the city introduced in the councils November 14, 1887 (15). The contract for the pavement in controversy was signed by the plaintiff August 13, 1887 (6), was executed by the city September 12, 1887 (6), and the work was completed by the plaintiff on October 31, 1887 (7), and accepted by the city November 10, 1887 (7). Of course the assessment was not completed until it had been approved by the councils. The joint resolution of the councils appointing the viewers directed them to report their schedules when made to the councils (12).

We deem it unnecessary at this time to enter into any discussion of the authorities relied upon by the petitioner's counsel upon the merits of the question involved in the case. We understand the only matter before the court now to be whether there is any question of law in the case of such paramount importance that it should be settled now by this court for the instruction and guidance of all the federal courts. We must, however, be permitted to say, what we said to the court below, that no case can be found, either in the state or in the federal reports, which holds that *when a municipal corpora-*

tion, having authority by law to have work done on its streets and paid for out of the general fund, employs a contractor to do such work and agrees to turn over to him special assessments to which, solely, he agrees to look for his compensation, the city is not liable if it turns out that it was without authority to make any valid assessment whatever.

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